SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 30 | Issue 1

1979

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Shaffer v. Heitner: Some Thoughts on Its Impact on the Doctrines of Choice of Law and Preclusion by Judgment

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The Supreme Court in Shaffer v. Heitner *directed that the decision whether a state can assert jurisdiction over a nonresident must be evaluated according to the minimum contacts among the forum state, the defendant, and the litigation. In this article, Professor Fischer suggests that* Shaffer *has extended the obligations of courts in rendering forum allocation decisions in cases having multistate impacts. The author concludes that* Shaffer *mandates consideration of all relevant facts and consequences, including choice of law and judgment effects, in determining where a case having multistate aspects will be adjudicated.*

INTRODUCTION

A CONTROVERSY THAT has multistate contacts will give rise to judicial decisions with multistate impacts. In an era in which instantaneous cross-country commercial transactions and four-hour coast-to-coast travel are routine, it is clear that state boundaries do not provide the degree of insularity that they afforded in the past. It is therefore important to realize that when a forum is called upon to adjudicate a multistate dispute, the decision to accept jurisdiction will have significant collateral consequences beyond that of geographically locating the case for decision. These other consequences include: (1) determination of the scope of matters to be, or to be treated as having been, decided by the forum by force of claim and issue preclusion doctrines such as compulsory counterclaim rules or the doctrines of res judicata and collateral estoppel[1] and/or (2) determination of the substantive rule of decision in jurisdictions which use interest analysis or one of its variants in making rule of decision determinations.[2]

The product of the concepts of geographic forum selection,

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1. *See* text accompanying notes 10–64 *infra*.
2. *See* text accompanying notes 65–92 *infra*.

choice of law, and judgment inclusion or preclusion is synergistic; the combined effect of these discrete concepts is greater than the sum of each evaluated independently. Judicial recognition of this synergism in jurisdictional disputes is crucial. It is one question when a court that has a strong relationship to the controversy exercises jurisdiction, validates its local interests through choice of law methodology, and compels the parties under pain of preclusion to present all of their claims for adjudication in that forum. It is another question for a court to apply its choice of law methodology and define the scope of the judgment rendered when its relationship to the controversy is weak. When a court examines the jurisdictional problem in the traditional fashion, the total repercussions of that analytical approach are often obscured. A court which treats the forum allocation question as consisting solely of the decision where geographically to decide the case fails to perceive the circuity of effects engendered by the initial exercise of jurisdiction. To illustrate, a court, once having exercised jurisdiction, may be called upon to validate local interests which only become persuasive because the case is being litigated in that forum.

Especially since *Shaffer v. Heitner*,[3] where the Supreme Court abrogated the distinction between *in personam* and *in rem* actions,[4] judicial failure to address the synergism in jurisdictional disputes is untenable. The differing treatment afforded *in personam* and *in rem* actions was the bulwark upon which the traditional linear view of forum allocation flourished; it allowed a compartmentalization of legal interests such that those additional substantive implications which necessarily accompany the exercise of jurisdiction were minimized. Since that compartmentalization is no longer available to support traditional jurisdictional analysis, it is incumbent upon the legal community to formulate a new analysis to deal with the new range of jurisdictional variables *Shaffer* ushered in.

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3. 433 U.S. 186 (1977).

4. A judgment *in personam* is personally binding upon the defendant. A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property. RESTATEMENT OF JUDGMENTS §§ 1-9 (1942). Judgments *quasi in rem* are of two types. In one (hereinafter referred to as type I), the plaintiff seeks to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other (hereinafter referred to as type II), plaintiff seeks what is conceded to be the property of the defendant in satisfaction of a claim against the defendant. *Id.* §§ 5-9, *quoted in* Shaffer v. Heitner, 433 U.S. 186, 199 n.17 (1977).

In *Shaffer*, a shareholder of a Delaware corporation filed a derivative action against the corporation, one of its subsidiaries, and a number of current and former officers and directors, alleging breaches of fiduciary duty in causing the two corporations to sustain a substantial adverse judgment in a private antitrust suit and a large fine in a criminal contempt action. In connection with the derivative action, the plaintiff sought to invoke the Delaware court's *quasi in rem* jurisdiction to obtain a sequestration order under Delaware law on stock certificates owned by certain of the individual defendants who were nonresidents of Delaware.[5]

The central theme of the Court's opinion is that forum allocation decisions involving nonresident defendants must be based upon the concept that *all* exercises of jural power are proceedings against the interests of persons.[6] Consequently, the propriety of the exercise of jurisdiction must be measured by the relationship between the defendant and his or her legal interests and the forum, not merely by asserting authority over the defendant's property in the forum.[7]

The premise for this integrated theory of jurisdiction was not new; it had been expressed by Mr. Justice Holmes while a member of the Supreme Judicial Court of Massachusetts.[8] Until *Shaffer*, however, it lay fallow under the fiction that legal proceedings could be competently directed against inanimate objects as well as persons. The legal fiction of *in rem* jurisdiction allowed courts to

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5. None of the certificates were physically present in Delaware. The sequestration order was predicated upon a Delaware statute which declared the situs of shares of a Delaware corporation to be Delaware. DEL. CODE ANN. tit. 8, § 169 (Michie 1974). Delaware adhered to the view that shares of corporate stock were "on the books" of the corporation in the state of its incorporation and could be "seized" by writs of attachment in that state. Other jurisdictions have rejected this view and treat the *res* as being embodied in the stock certificate. *See, e.g.*, U.C.C. § 8-317(l). Under this view, writs of attachment can only issue where the stock certificates can be physically taken into custody.

6. 433 U.S. at 212 ("We therefore conclude that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* [*Co. v. Washington*, 326 U.S. 310 (1945)] and its progeny.").

7. *Id.* at 214–16.

8. Tyler v. Judges of the Court of Registration, 175 Mass. 71, 55 N.E. 812, *appeal dismissed*, 179 U.S. 405 (1900).

> If the technical object of the suit is to establish a claim against some particular person . . . or to bar some individual claim or objection . . . the action is *in personam*, although it may concern the right to, or possession of, a tangible thing . . . . If on the other hand the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established . . . the preceeding is *in rem*. . . . All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected.

Id. at 76, 55 N.E. at 814.

expand legal remedies by providing courts for creditor-suitors wherever property of the debtor could be found. Seen in this light, *Shaffer* evidences a judicial realization that the fiction should no longer be utilized,[9] that jurisdictional theory should accommodate reality rather than seek to be accommodated by legal fictions.

In the aftermath of *Shaffer*, a court which seeks to assert jurisdiction over a dispute must focus upon the truly interested party and his or her relationship to the forum. It is in this sense that *Shaffer* has brought into play an integrated theory of jurisdiction. It is the impact of this great transformation of legal methodology upon current legal principles that is of concern here.

I. FAIRNESS AND CONSEQUENCES COLLATERAL TO THE ASSERTION OF JURISDICTION

Fairness and justice are relative concepts, not absolutes. Doctrine formulated in the abstract can often seem ill-advised when applied to a specific problem. The theory of jurisdiction expressed in *Shaffer* carries the seed of this problem, for while the Court confidently cast off the old learning of *Pennoyer v. Neff*,[10] it failed to consider and to provide for the numerous doctrinal consequences that the old teaching had developed and nurtured. The

9. *See* L. FULLER, LEGAL FICTIONS 14, 19 (1967):

> A fiction dies when a compensatory change takes place in the meaning of the words or phrases involved, which operates to bridge the gap that previously existed between the fiction and reality . . . . One may test the question whether a fiction is dead or alive by the inquiry, does the statement involve a pretense? Probably the maxim "Qui facit per alium facit per se" [He who acts through another acts himself.] was originally a fiction because it was understood as an invitation to the reader to pretend that the act in question had actually been done by the principal in person. But the statement has been so often repeated that it now conveys its meaning (that the principal is legally bound by the acts of the agent) *directly*, the pretense that formerly intervened between the statement and this meaning has been dropped out as a superfluous and wasteful intellectual operation. The death of a fiction may indeed be characterized as a result of the operation of the law of economy of effort in the field of mental processes.

With the recent extension of state jurisdiction through invocation of "long arm" statutes, the former need to create *in rem* jurisdiction to provide a convenient forum for local creditors or for the advancement of important state interests such as the status of land title has been greatly ameliorated. In most instances, a modern long arm statute could be fashioned to allow the assertion of jurisdiction over nonresidents who transact business in the state or who own land in the state.

10. 95 U.S. 714 (1878). In *Pennoyer*, the Supreme Court established a theory of jurisdiction that limited the jurisdictional reach of the states to their territorial boundaries but gave them full, unfettered power over persons and property physically within the state. The history of jurisdiction theory after *Pennoyer* is most pronouncedly marked by the erosion of this territorial concept. *See, e.g.*, Milliken v. Meyer, 311 U.S. 457 (1940) (jurisdiction can be exercised over person domiciled, though not physically present, in the state).

concept of territorialism, the postulate by which personal jurisdiction doctrine from *Pennoyer* to *Shaffer* was formed, did not exist in a vacuum. The radiations of that concept affected doctrines such as full faith and credit and choice of law. Full appreciation of the impact of *Shaffer* upon current disputes having multistate contacts requires further investigation into the present configuration of these aligned doctrines.

A. *Fairness and Full Faith and Credit*

Traditionally, a court could exercise three types of jurisdiction: *in personam, in rem*, and *quasi in rem*.[11] The type of jurisdiction used affected both the scope of the state's power to adjudicate the dispute and the degree of recognition a sister state would be constitutionally[12] required to give the judgment.

In *Pennoyer v. Neff*,[13] the Court began the marriage of due process and full faith and credit when it held that a judgment that was not enforceable in a foreign state (because it failed to comply with the basic requisites of due process of law) could not be enforced in the rendering state.[14] Further, when a court improperly exercised jurisdiction and rendered a decision, that judgment remained open to collateral attack, at least where the jurisdiction issue had not been previously litigated.[15] This impediment to state power was easily avoided, however, by recasting the base of jurisdiction as *in rem* and initiating the litigation by attaching or otherwise bringing under the control of the court property of the defendant having a situs (actual or fictional) in the forum. By characterizing the exercise of jurisdiction as *in rem* or *quasi in rem*, the court was able to adjudicate interests in the property against the whole world or a portion of it. While a sister state was required to abide by the rendering court's disposition of interests

11. *See* note 4 *supra*.

12. The "full faith and credit clause" of the Constitution provides:

> Full Faith and Credit should be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art. IV, § 1.

13. 95 U.S. 714 (1878).

14. *Id.* at 732; *see* Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From* Pennoyer *to* Denkla: *A Review*, 25 U. CHI. L. REV. 569, 573 (1958).

15. 95 U.S. at 732–33; *see Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 991–98 (1960).

in the *res*, it was required to do no more.[16]

Illustrative of this concept is *Pennington v. Fourth National Bank*.[17] A wife sued her husband for a divorce and alimony in Ohio. To insure payment, she joined the defendant bank in which her husband had an account. Eventually, the court entered an order that enjoined the bank from paying out any of the money in the account to the husband and ordered that it be paid over to the wife.[18] The husband then presented the bank with a check for the full amount of the deposit. Payment of the check was refused by the bank. The husband thereupon commenced an action for the deposit account claiming that the court's order was invalid since he (1) was a nonresident of the state of Ohio, (2) had not been personally served with process within the state, (3) had not voluntarily appeared in the suit, and (4) had been served by publication only.[19] The Supreme Court upheld the order:

> The Fourteenth Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a State possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a nonresident—of which bank deposits are an example—is property within the State. . . . The only essentials to the exercise of the State's power are presence of the *res* within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist a decree for alimony against an absent defendant will be valid under the same circumstances and to the

16. The judgment *in rem* exhausted itself upon the attached property. *See, e.g.*, Riley v. New York Trust Co., 315 U.S. 343 (1941). *Riley* concerned the propriety of relitigation by a Delaware court of the question of ownership of certain shares of stock which were part of the decedent's estate. Ownership turned upon the determination of where the decedent was domiciled at the time of her death. A prior Georgia judgment had determined her domicile to be Georgia, but New York Trust Company, as temporary administrator, maintained that her domicile was New York. In ruling upon the range of the Georgia judgment, the Court observed:

> It may be assumed that the judgment of probate and domicile is a judgment *in rem* and therefore, as "an act of the sovereign power," "its effects cannot be disputed" within the jurisdiction. But this does not bar litigation anew by a stranger, of facts upon which the decree *in rem* is based. . . . While the Georgia judgment is to have the same faith and credit in Delaware as it does in Georgia, that requirement does not give the Georgia judgments extra-territorial effect upon assets in other states. So far as the assets in Georgia are concerned, the Georgia judgment of probate is *in rem*; so far as it affects personalty beyond the state, it is *in personam* and can bind only parties thereto or their privies.

315 U.S. at 353 (citations omitted).

17. 243 U.S. 269 (1917).

18. *Id.* at 270.

19. *Id.* at 270–71.

> same extent as if the judgment were on a debt—that is, it will be valid not *in personam*, but as a charge to be satisfied out of the property seized.[20]

Where a state had sovereign power over a *res*, it could adjudicate all interests in the *res* and issue a decree which would protect any holder of the *res* from the possibility of multiple liability. In other words, in any later proceedings involving the same *res* brought by a nonappearing claimant of the *res* against the holder, the holder could plead satisfaction of the prior *in rem* or *quasi in rem* judgment as a bar in whole or in part to the second action.[21] This, however, was all the *in rem* action accomplished. There was no claim preclusion (merger or bar as a result of the first judgment), nor was there any issue preclusion (collateral estoppel).[22] This resulted because the legal definition of what was determined and concluded by a valid *quasi in rem* or *in rem* action differed substantially from the legal view of what was determined and concluded by a valid *in personam* action.[23]

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20. *Id.* at 271–72. *See also*, American Express Co. v. Mullins, 212 U.S. 311 (1909) in which a state judgment was predicated upon the confiscation of a *res* (a shipment of whiskey) in the possession of American Express. The shipper was precluded from recovering the value of the *res* against American Express where American Express had timely notified the shipper of the existence of the *in rem* action.

21. *See* RESTATEMENT (SECOND), CONFLICT OF LAWS, § 66, comment (f), § 68, comment (e) (1969).

22. *See id.* § 66, comment (f).

> If the plaintiff brings an action against a defendant who is not personally subject to the jurisdiction of the court and a thing belonging to the defendant is attached, the plaintiff's cause of action is not merged in any judgment the plaintiff may obtain. The plaintiff may maintain an action in the same state, or in another state, on the original cause of action.

Id.

> Although a valid judgment *in rem* is binding on all the world as to interests in the thing which is the subject of the action, it is not conclusive as to a fact upon which the judgment is based in any subsequent action not involving interests in the thing, except as to persons who have appeared and actually litigated the question of the existence of the fact.

RESTATEMENT OF JUDGMENTS § 73, comment (c) (1942). The same principle applies to judgments *quasi in rem*. *Id.* at § 75, comment (c).

23. While courts generally require actual litigation to bring into play the doctrine of issue preclusion (collateral estoppel), most jurisdictions treat a default judgment as having claim preclusion (res judicata) consequences. *See Developments—Res Judicata*, 65 HARV. L. REV. 818, 839 (1952). Thus, defenses and counterclaims of the nonresident defendant may be barred by operation of the default judgment. Traditionally, the problem was ameliorated by the fact that the *in rem* action was limited to the *res* itself. In essence, the *res* defined the cause of action. *See, e.g.*, F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.21 (2d ed. 1977) ("Since the basis of the court's authority is the property itself, the court cannot purport to determine the claim itself; the judgment determines only whether defendant retains the property . . . or plaintiff takes it . . . ."). Since *Shaffer*, however, it is the claim that is legally and actually determined. The consequences of the judgment are unclear

Consequently, the practical effect of affording *in rem* judgments full faith and credit was no more prejudicial to the nonresident than the consequence of being subjected to *quasi in rem* or *in rem* jurisdiction in the first instance. The prejudice sustained by the nonresident was the forced election: the defendant could appear in the *in rem* action and defend his or her property interests, thereby converting the action to an *in personam* action (unless the forum recognized a limited appearance),[24] or forego an appearance and prevent the transformation of the action to a personal adjudication, but suffer the inevitable loss of his or her property by default judgment.[25] In essence, the problem of prejudice reduced itself to the evaluation of competing policies. The absence of a limited appearance on the one hand required the defendant to make the forced election described above. On the other hand, it provided an economic incentive for the nonresident to appear, allowed the conversion of the action into an *in personam* proceeding, and avoided the possibility of a multiplicity of suits involving basically one transaction or occurrence. Moreover, since the jurisdictional base was limited, the loss potentially sustained by reason of the forced election was confined to the property seized. It was not amplified by any judgment attributes such as claim preclusion or issue preclusion which would be enforceable against the nonresident.

The above point is best illustrated by examination of a type II *quasi in rem* action,[26] since such a suit did not proceed upon any theory that a claim to specific property was the basis for the action, as would have been the case with a true *in rem* action.[27] The type II *quasi in rem* action was based upon a personal claim by the plaintiff against the defendant. Through seizure of the property by judicial process, the *in personam* claim became a claim against

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because of the uncertainty surrounding the scope of the Court's new integrated doctrine of *in personam* jurisdiction.

24. The limited appearance provided the nonresident with an immunity from service of summons while he or she defended his or her property; the plaintiff was thereby prevented from converting the action into an *in personam* suit by serving the defendant while he or she was in the forum. *See* Cheshire National Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916). However, it did not prevent a sister state from treating the limited appearance as, in effect, an *in personam* proceeding. *See* Harnischfeger Sales Corp. v. Sternberg Dredging Co., 189 Miss. 73, 191 So. 94 (1939).

25. *See* Taintor, *Foreign Judgments In Rem: Full Faith and Credit v. Res Judicata in Personam*, 8 U. PITT. L. REV. 223 (1942); Note, *Effect of a General Appearance to the In Rem Cause in a Quasi In Rem Action*, 25 IOWA L. REV. 329 (1940).

26. *See* note 4 *supra*.

27. *See id.*

the property that had been subjected to the court's jurisdiction. The forum exercised jurisdiction to proceed against the nonresident, but only for the limited purpose of condemning his or her interests in the *res*.

The treatment of *quasi in rem* judgments under the full faith and credit clause is demonstrated in *Huron Holding Corp. v. Lincoln Mine Operating Co.*[28] In that case, Lincoln obtained a judgment against Huron in a federal district court in Idaho. While Huron appealed the judgment rendered in favor of Lincoln, a third party sued Lincoln in a New York state court by garnishing Huron, a New York corporation, and constructively serving Lincoln. Huron answered the garnishment, admitted it was Lincoln's judgment debtor, and alleged that an appeal of Lincoln's judgment was pending. After the federal court of appeals affirmed Lincoln's judgment, the New York state court rendered judgment against Lincoln, and Huron paid.[29] The Supreme Court held that the Idaho federal district court must give full faith and credit to the New York judgment and Huron's payment thereunder.[30] In other words, the *quasi in rem* action was entitled to full faith and credit insofar as the judgment affected property interests properly brought under the jurisdiction of the court, but it did not affect the *in personam* claim. Where a plaintiff properly invoked *quasi in rem* jurisdiction to adjudicate a personal claim (such as damages for breach of contract), he or she could obtain a valid default judgment and satisfy that judgment up to the value of the property seized pursuant to judicial process. Moreover, the plaintiff could sue the debtor again on the original claim to recover any balance due which was not satisfied as a result of the *quasi in rem* action; but he or she could not sue on the judgment nor use the judgment to establish the validity of the claim.[31] Only in a sense, therefore, was it accurate to say that *quasi in rem* judgments were entitled to full faith and credit. Before *Shaffer*, a valid *quasi in rem* action foreclosed, against properly notified individuals,[32] in-

28. 312 U.S. 183 (1940).

29. *Id.* at 186–87.

30. *Id.* at 189, 194.

31. *See* notes 21–22 *supra*.

32. Proper notification in a type II *quasi in rem* action required actual notice by the garnishee to the creditor. *See, e.g.*, Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183 (1940).

> It has not been urged here, nor was it urged in the courts below, that Huron was guilty of any negligence, misconduct or fraud in connection with the New York judgment. It has not been claimed that there was a failure to give Lincoln notice of the New York suit against it.

terests in the property seized. It did not foreclose any interests in the underlying claim save for the rule that a plaintiff could have only one satisfaction.[33]

That the full faith and credit consequences of *quasi in rem* actions were not as broad as the full faith and credit effects of *in personam* actions did not diminish the practical consequences of such judgments. To the extent that *quasi in rem* judgments were entitled to full faith and credit, they were identical to *in personam* judgments. For example, in *Sanders v. Armour Fertilizer Works*,[34] Sanders was entitled under certain fire insurance policies to a sum certain.[35] The policies were issued by two Connecticut insurers to Sanders, a resident of Texas. The insurers subsequently became "indebted" to Sanders by reason of a loss of Sanders' property due to fire. Under Texas law, the insurance proceeds, like the underlying insured property, were exempt from judicial execution. The Armour Company, Sanders' creditor, sued Sanders in an Illinois state court by garnishing the Connecticut-based insurance companies who were doing business in Illinois.[36] The insurance companies interpleaded Sanders and the Armour Company in a federal district court in Texas, where the question of the relationship between the Texas exemption statute and the Illinois proceedings arose.[37] The Court held that the Illinois garnishment created a judicial lien on the insurance proceeds that was entitled to full faith and credit.[38] Just as in the case of *in personam* judgments,[39]

Id. at 189. Actual notification, however, was not a prerequisite to the exercise of type II *quasi in rem* jurisdiction; rather, it was a judicially developed requirement that had to be satisfied so that the garnishee could avoid paying twice—once in the garnishment action and once again in a suit maintained by his or her other creditor. Harris v. Balk, 198 U.S. 215, 226–28 (1905).

33. Indeed, the genesis of the rule was to avoid double payment. *See id.* at 226 ("It ought to be and it is the object of courts to prevent the payment of any debt twice over.").

34. 292 U.S. 190 (1934).

35. The indebtedness of the two insurers was adjusted at $3400.00 and $4250.00, respectively, a sum they each agreed to pay. *Id.* at 196.

36. The proceeding was based upon notes given by Sanders which undertook to waive his homestead and exemption rights under Texas law. The garnishee insurers admitted a debt owed to Sanders and gave notice of his claim that the proceeds of the policy were exempt under Texas law. *Id.* They also apparently gave notice to Sanders. *Id.* at 209.

37. *Id.* at 202–06.

38. *Id.* at 204. Justice Cardozo's dissent did not contradict the basic premises of the majority opinion. However, he did voice objection to the majority's characterization of the effect of the garnishment proceedings under Illinois law. The majority held that garnishment created a lien upon the debt or *res* which, when followed by a judgment, created "a paramount right or superior equity" to the insurance proceeds. *Id.* The dissent argued that "[g]arnishment in Illinois does not create a lien upon the debt or chose in action subjected to the writ." *Id.* at 206 (Cardozo, J., dissenting). The judgment, in the absence of a

the constitutional demand for full faith and credit outweighed the reluctance of one state to execute the judgment of a sister state.[40]

Another case illustrating the scope of *quasi in rem* judgments is *Chicago Rock Island and Pacific Railway Co. v. Sturm*.[41] Sturm, a resident of Kansas, held a claim for wages due to him by the railroad.[42] Garnishment proceedings were properly brought against the railroad in Iowa by a creditor of Sturm. While the Iowa proceedings were in progress, Sturm brought an action in Kansas against the railroad for the wages. The amount that the railroad owed Sturm was exempt from execution under Kansas law. The railroad had timely notified Sturm of the pendency of the Iowa proceedings and had interposed the defense of exemption in the Iowa action.[43] In the Kansas action, the railroad interposed the defense of the Iowa garnishment proceedings; however, the defense was rejected by the Kansas courts.[44]

The Supreme Court reversed. Although the decision dealt primarily with the question of the situs of the debt,[45] the Court held further that exemption claims are remedial and hence subject to the law of the forum.[46] Iowa was entitled to ignore the Kansas exemption, while Kansas was obligated to give full faith and

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lien, did not operate *in rem*. *Id.* at 209 (Cardozo, J., dissenting) (citing Pennoyer v. Neff, 95 U.S. 714 (1878)). Hence, to give the Illinois proceedings full faith and credit operated to give them greater effect "than they have by law or usage in the courts of Illinois." *Id.* at 206 (Cardozo, J., dissenting).

39. *See* Fauntleroy v. Lum, 210 U.S. 230 (1908). In *Lum*, the Court required Mississippi to give full faith and credit to a Missouri decree confirming an arbitrator's award on a futures contract. The contract had been created in Mississippi, but enforcement of the contract was prohibited in Mississippi courts because Mississippi law treated futures contracts as gambling obligations and hence illegal contracts. Nevertheless, the Court ordered enforcement of the Missouri decree even though to do so ran counter to Mississippi's substantive legal interests and public policy.

40. *Id.* at 236–38.

41. 174 U.S. 710 (1899).

42. The facts of the case were not set forth in the Court's opinion. They are drawn from the syllabus prepared by the Reporter.

43. *Id.* at 718.

44. *Id.* at 712.

45. *Id.* at 717.

46. *Id.* The characterization of the issue as remedial was important because the application of Iowa law to a controversy whose only connection with the forum was the presence of the *res* might otherwise run afoul of due process constraints. *See* Home Insurance Co. v. Dick, 281 U.S. 397 (1930) (application of Texas law to controversy before Texas court on *quasi in rem* theory of jurisdiction violates fourteenth amendment due process where the acts upon which the claim of liability is based bear no relationship to the forum). While the presence of the *res* would support the exercise of jurisdiction, it would not, of itself, support the application of the forum's own rules of decision to the adjudication of the dispute.

credit to the Iowa garnishment proceedings in that payment by the garnishee railroad extinguished *pro tanto* its obligation to its creditor, Sturm.[47]

By means of similar analysis, *in rem* actions involving stockholder assessments pursuant to statutory schemes of the state of incorporation were held conclusive as to the necessity for, and the amount of, the assessment even though the stockholders were not made parties to the proceeding which levied the assessment.[48] It was still, however, open to any persons over whom the court did not have *in personam* jurisdiction to assert that they were not stockholders[49] or raise other personal defenses.[50]

In summary, a judgment—whether *in personam*, *in rem*, or *quasi in rem*—was "entitled to faith and credit for just what it is, and no more."[51] Prior to *Shaffer*, there existed an easy equilibrium between the law of jurisdiction and the full faith and credit clause. The full faith and credit clause required that each state of the union recognize and give credit to the lawful judgments rendered by sister states. On the other hand, jurisdiction doctrine limited the power of the rendering state and, hence, qualified the force of the judgment, not only in the rendering state but also in sister states.[52] Where the rendering state could exercise *in personam* jurisdiction over the nonresident, the doctrines of claim and issue preclusion took full effect since the power of the rendering state over the nonresident entitled the rendering state to incorporate these attributes of a judgment into the decree. However, where jurisdiction was premised upon property of the nonresident located within the forum (*in rem* jurisdiction), the power of the rendering state was constrained by the due process clause to the property or *res* itself; the force of the judgment was exhausted on the property or *res*. As this was all the rendering state could do,

47. *See* Barber v. Barber, 323 U.S. 77, 87 (1944) (Jackson, J., concurring):

> Neither the full faith and credit clause of the Constitution nor the Act of Congress implementing it says anything about final judgments or, for that matter, about any judgments. Both require that full faith and credit be given to "judicial proceedings" without limitation as to finality. Upon recognition of the broad meaning of that term much may some day depend.

48. Broderick v. Rosner, 294 U.S. 629 (1935).

49. *See* Great Western Telegraph Co. v. Purdy, 162 U.S. 329 (1896).

50. *See* Converse v. Hamilton, 224 U.S. 243 (1912); *see generally*, Moore & Oglebay, *The Supreme Court and Full Faith and Credit*, 29 U. VA. L. REV. 577, 559–93 (1943).

51. Barber v. Barber, 323 U.S. 77, 87 (1944) (Jackson, J., concurring).

52. *See* Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 197 (1915) ("The two clauses [due process and full faith and credit] are harmonious and because the one may be applicable to prevent a void judgment being enforced affords no ground for denying efficacy to the other in order to permit a void judgment to be rendered.").

this was all a sister state was required to recognize and credit. Any problems of "fairness" were thus resolved at the jurisdictional end of the lawsuit by the characterization of the action as *in personam* or *in rem*. There was no need to evaluate the propriety of exercising jurisdiction by any analysis of the full faith and credit implications of the judgment.

The Court's acceptance in *Shaffer* of an integrated theory of jurisdiction obscures this neat categorization. The case of *Combs v. Combs*[53] illustrates the problem. *Combs* involved the effect to be given an Arkansas judgment, which cancelled a lien on land situated in Arkansas, in a Kentucky proceeding brought to recover on the debt that the lien had secured. The Kentucky court characterized Arkansas' jurisdiction as *in rem* and limited the effect of the judgment to removal of the lien.[54] The judgment was not seen as affecting interests in the debt itself.[55]

In the aftermath of *Shaffer*, it is not as likely that the use of the *in rem* characterization would provide such a facile resolution of the question. On the one hand, *Shaffer* indicated that characterization of the jurisdictional base as *in personam, in rem*, or *quasi in rem* does not abrogate the requirement that the requisite level of forum contacts exist so that the exercise of jurisdiction does not offend due process requirements.[56] On the other hand, the Court strongly implied that the ownership or possession of land or an interest in land would of itself constitute a sufficient relationship to the forum to warrant the exercise of jurisdiction over causes of action or claims relating to the land.[57] Thus, were *Combs v. Combs* decided today the result could well differ: the land was located in Arkansas and the agreement creating the lien on the land was entered into by the nonresident with knowledge that the land was located in Arkansas. Cancellation of the lien would

53. 249 Ky. 155, 60 S.W.2d 368 (1933).

54. *Id.* at 161, 60 S.W.2d at 370.

55. *Id.* at 162, 60 S.W.2d at 370–71.

56. Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

57. *Id.* at 207–08. Indeed, two justices specifically concurred upon the understanding that *quasi in rem* jurisdiction survived *Shaffer* where the *res* consists of a fixed immovable such as realty. *Id.* at 217 (Powell, J., concurring); *Id.* at 218 (Stevens, J., concurring). Justice Stevens further intimated that where one acquires a *res* in a foreign jurisdiction, one knowingly assumes the risk that *in rem* type jurisdiction can be asserted. *Id.* Several lower federal courts have so construed *Shaffer*. *See, e.g.*, Intermeat, Inc. v. American Poultry Inc., 575 F.2d 1017 (2d Cir. 1978) (jurisdiction acquired by attachment of debt upheld where creditor of the garnishee had substantial contacts with the forum); Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977) (jurisdiction acquired by attachment of nonresident's forum bank account upheld).

probably necessitate that the debt be fixed and determined. From a facts and circumstances perspective, there is no meaningful difference between the lien and the debt. Consequently, one would hesitate to advise the lienholder that the debt would not be lost through res judicata or a compulsory counterclaim rule. Although the rendering court might (1) treat the validity of the lien as a cause of action distinct from the debt[58] or (2) treat a second action as not impairing rights established under the first action,[59] and thus preserve the lienholder's debt claim, after *Shaffer* there is a greater risk that a court would be required under the full faith and credit clause to hold that the first judgment cancelling the lien also precluded relitigation of the underlying debt. Today, a creditor in a *Combs*-type action, instead of facing a nonbinding *in rem* action extinguishing the lien on the land, might be confronted with a binding adjudication of the debt itself.

The potential defendant in a *Combs*-type case encounters a new election problem in the post-*Shaffer* era. Prior to *Shaffer*, the election was between losing the land or appearing; the post-*Shaffer* election may be between losing the entire claim or appearing. In reality such a litigant now has no election at all since the consequences of nonappearance may be as severe as entering an appearance.[60] While prior to *Shaffer* jurisdictional standards defined the cause of action, now they do not.

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58. *See, e.g.*, Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957), *cert. denied*, 357 U.S. 569 (1958), where the court used a minimum contacts due process analysis to determine whether jurisdiction *in rem* could be exercised to adjudicate a nonresident trustee's interest in trust funds. The court made no attempt to allocate a situs to the funds. *Atkinson* thus presents a case involving personal jurisdiction over a nonresident limited to the disposition of the nonresident's interest in the *res*. A similar result is reached in jurisdictions which apply the *Seider* doctrine. *See, e.g.*, Comment, *Quasi in Rem on the Heels of Shaffer v. Heitner: If the International Shoe Fits. . .* 46 FORDHAM L. REV. 459, 486 (1977).

59. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 56.1 (Tent. Draft 1973):

> Effect of Failure to Interpose Counterclaim
>
> (1) Where the defendant may interpose a claim as a counterclaim but he fails to do so, he is not thereby precluded from subsequently maintaining an action on that claim, except as stated in Subsection (2).
>
> (2) A defendant who may interpose a claim as a counterclaim in an action but fails to do so is precluded, after the rendition of judgment in that action, from maintaining an action on the claim if:
>
> (a) The counterclaim is required to be interposed by a compulsory counterclaim statute or rule of court, or
>
> (b) The relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action.

60. Under the full faith and credit clause, the consequences of the judgment throughout the nation are determined by the consequences of the judgment in the state of rendition. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943); Riley v. New York Trust Co., 315 U.S. 343 (1941); RESTATEMENT (SECOND), CONFLICT OF LAWS § 95 (1969).

Shaffer, in the course of doctrinal reformation, worked a profound change in the way courts relate fairness considerations to multistate disputes. Prior to *Shaffer*, the concept of fairness was largely relegated to resolution of the problem of competing interests posed by the characterization of the jurisdictional base as *in personam* or *in rem*. Where the basis of jurisdiction was *in rem*, the legal system perceived it as not unfair to require the defendant to elect between forfeiting the *res* by nonappearance and consequent default or appearing to defend, thereby converting the lawsuit into an *in personam* action.[61] The risk of litigation involving the *res* was simply an incident to or burden of property ownership. *Shaffer* inadvertently confounds this system of established risks. To use *Combs* as an example: Is it fair as a matter of due process of law to require a nonresident to litigate at the place where the security is located (Arkansas) instead of at the place where the debt was incurred or formalized (Kentucky)? The *Shaffer* Court, on the one hand, recognized that the states need to be able to clear title, remove clouds, and entertain actions involving a *res* located within the state.[62] On the other hand, if the state court may compel a nonresident to submit to its jurisdiction on these matters, what consequences, if any, result? To what extent may the forum impute to the judgment attributes of claim preclusion?[63] What effect, if any, must a sister state give to such a judgment? If full faith and credit sets a bottom line of recognition and effect which a sister state *must* give to a judgment, does due process set an upper limit of recognition that a state *may* give to a sister state proceeding?[64]

The preceding questions demonstrate a curious irony of *Shaffer*: *Shaffer* has not really worked a remaking of jurisdiction the-

61. *See* text accompanying notes 22, 23 & 25 *supra*.

62. Shaffer v. Heitner, 433 U.S. 186, 208 (1977).

63. *See* text accompanying notes 106–22 *infra*.

64. *See* note 24 *supra*. Even where the rendering state would not treat the matter as res judicata, the enforcing state may as a matter of comity. *See, e.g.*, McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961) (giving recognition to a foreign decree purporting to convey realty located within the forum although not required to do so by the full faith and credit clause, citing Fall v. Eastin, 215 U.S. 1 (1909)). The enforcing state may also give greater effect to the judgment than the rendering state as a matter of judicial efficiency. *See, e.g.*, Hart v. American Airlines, 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct. 1969) (applying forum doctrine of collateral estoppel, which did not require mutuality of estoppel for in-forum application, to a Texas judgment). *See also* Worthley v. Worthley, 44 Cal. 2d 465, 468, 283 P.2d 19, 22 (1955) ("Since the New Jersey decree is both prospectively and retroactively modifiable . . . we are not constitutionally bound to enforce defendant's obligations under it. . . . Nor are we bound *not* to enforce them.").

ory (in the sense of forum allocation principles) as much as it has worked a redistribution of the point at which the fairness question must be resolved. In the post-*Shaffer* era, the question a court must resolve is whether it is fair to allow a state to affect legal interests by judgment in situations where the relationship between the nonresident and the forum is marginal. The basic problem remains, but its focal point has changed: must the nonresident appear or default? If the nonresident appears, is it wise, or consistent with the full faith and credit clause that he or she be allowed to relitigate questions of liability in later proceedings? Is it wise, or consistent with the due process clause that the nonresident finds his or her claims and defenses foreclosed because the focus of inquiry is the claim rather than, as before, the *res* that was attached and brought under the control of the court? The *Shaffer* opinion itself provides no clear response to this continuing conflict in forum allocation decisions of the antinomies of fairness to parties and efficiency to courts.

B. *Fairness and Choice of Law*

Under modern choice of law analysis, the decision where a controversy will be adjudicated strongly influences resolution of the issue of which jurisdiction's rules of decision will be applied to resolve the case. This relationship comes about as a result of constitutional interpretation and modern choice of law doctrinal development. The practical effect of these two factors is that a state asserting jurisdiction over the parties to a dispute will probably decide to apply its own law to resolve the underlying dispute.

At the constitutional level, the Supreme Court has been increasingly tolerant of a forum state's decision to apply its own law to controversies having only a tenuous nexus to that state. This tolerance is illustrated by *Clay v. Sun Insurance Office, Ltd.*[65] In

65. 377 U.S. 179 (1964). The Court has docketed a case which will provide it with an opportunity to reexamine the continued vitality of *Clay*. Rush v. Savchuk, 440 U.S. 1211 (1979), involves the constitutionality of the application of Minnesota law to a suit which arose in Indiana between Indiana residents. After the accident at issue, the plaintiff-guest moved to Minnesota and commenced an action by attaching the defendant-insured's policy issued by State Farm Insurance Co. State Farm was required to defend the insured in the event of a lawsuit claiming negligent operation of the vehicle and indemnify him up to policy limits for any judgment rendered against him. Jurisdiction over State Farm in Minnesota was predicated solely on the fact that State Farm was doing business in the state. The choice of law conflict arose over the fact that under Indiana's guest statute the plaintiff's action was barred; under Minnesota law the action could proceed. The choice of law issue may, however, not be reached. Unlike the normal *Seider* case, see note 83, *infra*, in

that case, an insurance policy was purchased in Illinois while the insured was a citizen and resident of that state. The insurer was a British corporation licensed to do business in Illinois, Florida, and several other states. A few months after purchasing the policy, the insured moved to Florida and became a citizen and resident of that state. Subsequently, a loss occurred for which the insured sought reimbursement under the policy. The problem was that the policy contained a clause that barred any claim not sued upon within one year of its maturity. This clause was valid under Illinois law but was invalid under the law of Florida where the action was brought.[66] Simply put, the insured's action was not barred if Florida law applied, but it was barred if Illinois law applied. The Court seemed to have little difficulty upholding the application of Florida law.[67] It noted the ambulatory character of insurance contracts, the fact that the policy provided worldwide coverage, and the fact that the insurer knew that the insured had moved to Florida.[68] Unfortunately, the *Clay* decision is notably silent on whether a due process analysis of a forum's choice of law rules is predicated upon a showing of sufficient forum contacts or sufficient forum interests.[69] Other pronouncements by the Court on

Savchuk the plaintiff obtained an after-acquired residency; he was not a forum (Minnesota) resident at the time the underlying accident occurred.

66. 377 U.S. at 180–81.

67. *Id.* at 181–82.

68. *Id.*

69. The insurer never did anything that could be said to constitute a forum contact. At best the relationship between the insurer and the state of Florida rested upon the foreseeability that the insured and his property would become situated in Florida. Yet, while this would certainly speak for coverage of a loss occasioned after the insured left Illinois, it does not address the question of why the validity of the twelve month suit clause was deemed to be governed by Florida law. On the other hand, Florida did appear to have an interest in protecting forum domiciliaries against contractual statutes of limitation in derogation of Florida statutory law.

If *Clay* allowed the choice of law question to turn on forum interest, however, this would seem to render nugatory Home Ins. Co. v. Dick, 281 U.S. 397 (1930). In *Home Insurance*, Dick, a citizen of Texas, commenced an action against Compania General, a Mexican corporation, to recover on a policy of fire insurance for the loss of a tug. The loss had occurred in Mexican waters. Jurisdiction was asserted *in rem* through garnishment by ancillary writs against American reinsurers of the risk assumed by the Mexican corporation. The insurance policy had been issued by the Mexican company in Mexico to one Bonner of Tampico, Mexico. It was assigned to Dick in Mexico prior to the loss. The policy covered the tug only in certain Mexican waters. At the time the policy was assigned, and until after the loss, Dick actually resided in Mexico. The question before the Court was whether Texas could apply its longer statute of limitations to save Dick's action. The Court held it could not.

There are factual points to distinguish *Clay* from *Home Insurance*, notably the worldwide coverage and movement to the forum *before* the loss occurred which are present in

the subject have been similarly vague.[70] Nonetheless, *Clay* evidences a tolerant attitude toward a forum's use of local law to adjudicate a controversy as long as some reasonable basis exists, measured by some relationship between the forum and the controversy. If such a basis does exist, the question of which choice of law doctrine is to be applied loses its federal significance. In essence, such a decision amounts to an adequate and independent nonfederal ground upon which to predicate the forum's decision.[71]

At the nonconstitutional level of choice of law doctrinal formation, the approach of most modern theorists and courts has been to abandon or at least severely limit the jurisdictional selection formulas of the First Restatement.[72] Whether a forum adopts the view that state interest provides the methodology for resolution of choice of law questions,[73] the most significant relationship test of the Second Restatement,[74] rule orientation,[75] or enlight-

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Clay but not in *Home Insurance*. Nevertheless, if *Clay* expresses a constitutional test for choice of law predicated upon state interest, *Home Insurance* is severely undermined since Dick was a Texas domiciliary and Texas therefore did have an interest, legitimate or otherwise, in providing a forum for the adjudication of the controversy on the merits.

If, on the other hand, *Clay* used a forum contacts or mixed forum contacts/forum interest, reasonable relationship test, then *Clay* is reconciliable with *Home Insurance*. The factual disparities between the cases allow for the different results based upon either contacts counting or on the basis of foreseeability, *i.e.*, the likelihood at the time of contract formation that the law of a foreign jurisdiction would become applicable in whole or part to the controversy.

70. *See generally*, Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976). *See also*, Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U.L. REV. 33, 80 (1978).

71. *See* Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 456–57 (1959); *but see* Adam v. Saenger, 303 U.S. 59, 64 (1938) ("While this Court reexamines such an issue [choice of law] with deference after its decision by a state court, it cannot, if the laws and Constitution of the United States are to be observed, accept as final the decision of the state tribunal as to matters alleged to give rise to the asserted federal right."). Reconciliation may be achieved by recognizing that outside of certain unique areas such as fraternal associations, *see* Weintraub, *supra* note 71, at 475–77, the current view of the Court seems to be that the federal right exhausts itself upon the reasonable connection requirement. *See* Currie, *The Constitution and the Choice of Law: Government Interest and the Judicial Function*, 26 U. CHI. L. REV. 9 *passim* (1958).

72. In theory, the approach of the Restatement of Conflict of Laws was to design choice of law rules that would assure the same treatment for a case regardless of the fortuitous circumstances which often determine the selection of the forum. Thus, wherever the action was brought, the law of a particular jurisdiction would supply the rule of decision. *See* R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS, CASES-COMMENTS-QUESTIONS 13–14 (1975).

73. *See* Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958), *reprinted in* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 77 (1963).

74. *See, e.g.*, RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 145, 188 (1971).

ened territorialism,[76] the clear force of each doctrine is, to varying degrees, to ameliorate the theoretical, but never actual, neutrality of the jurisdictional selection formulas of the First Restatement.

Modern choice of law theory, for reasons that appear to be largely pragmatic, encourages parochialism on the part of the states. While this seems to run counter to an ideal implicit in the full faith and credit clause that disparate sovereign entities be united under one law,[77] it can be explained by the realization that the goal of uniformity necessary to the enforcement of judgments does not require a total abnegation of the forum's law to the law of another involved jurisdiction. A broad, expansive interpretation of the full faith and credit clause in connection with choice of law decisions would penalize whichever jurisdiction first decided to provide a forum, as it would then be required by constitutional command to defer to the law of the other jurisdiction involved.[78] Such a result would be absurd. Moreover, while the need for uniformity may be great with regard to enforcement of judgments, that need may not assume the same degree of intensity when applied to the laws of sister states. The reasons for this dichotomy were cogently explained by Reese and Kaufman:

> The second consideration [behind the Court's rare requirement that the forum apply the law of a sister state] lies in the objective sought to be attained by the full faith and credit clause itself. This objective, it is believed, is to confer some of the benefits of a unified nation while at the same time safeguarding the essential interests and powers of the states. Rarely will the interests of a particular state outweigh the national need that judgments be given the same effect throughout the country that they enjoy in the state of their rendition.[79]

Reese and Kaufman noted, however, that the same considerations did not necessarily apply to the field of choice of law:

> A judgment resolves only one or more existing controversies between a limited number of persons. A choice-of-law rule, on the other hand, looks to the future by providing that a given

75. *See, e.g.*, Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 316–17 (1972).

76. *See* Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971) (choice of law decisions should be made with reference to the place where *legally significant* events occurred). A legally significant event encompasses, for example, the state where a tort is committed. *Id.* at 390.

77. *See* Milwaukee County v. M.E. White Co., 296 U.S. 268, 276–77 (1953).

78. *See* Alaska Packers Ass'n v. Industrial Accident Comm., 294 U.S. 532, 547 (1935) ("In each, rights claimed under one statute prevail only by denying effect to the other.").

79. Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118, 1130–31 (1958).

> question, whenever it arises, shall be decided by the application of a particular state's law. A requirement that a state apply a given choice-of-law rule is therefore far more likely to affect its interests adversely than would any obligation on its part to recognize and enforce sister-state judgments. Consequently, perhaps a greater national need is required to justify rules of faith and credit in the field of choice of law than in the field of judgments.[80]

As a result of the Court's "hands-off" approach, choice of law doctrine has largely developed as an insular inquiry. Because of this mixture of constitutional *laissez faire* and doctrinal parochialism, one must pause before suggesting that choice of law questions not only necessarily, but also properly, impact upon forum allocation decisions. That they necessarily impact is easily demonstrated by choice of law doctrinal parochialism: modern choice of law doctrine often appears designed to provide a rationale for courts to apply their own local law.[81] Yet, to suggest that choice of law considerations ought to be extended to a unified forum allocation theory is not an argument in support of parochialism. It does suggest that choice of law consequences ought not to be ignored. The right of a forum to apply local law to a case over which it may exercise adjudicatory authority does not demand either the application of local law or the exercise of adjudicatory authority. Rather, since the decision where to hear the case will impact upon the choice of law decision itself, the total analysis should be assimilated so that in deciding whether to exercise jurisdiction, courts evaluate all of the possible impacts of that decision upon the outcome of the adjudication. It is the totality of these

80. *Id.*

81. The above observation is more intuitive than empirical. Nonetheless, even though candor on the part of courts, *see* Foster v. Leggett, 484 S.W.2d 827 (Ky. App. 1972) (when the court has jurisdiction of the parties its primary responsibility is to follow its own substantive law), and commentators, *see* Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1283, 1243 (1963) (if a conflict between the legitimate interests of two states is unavoidable, it should apply the law of the forum), is rare, one is struck by the number of instances in which courts define false conflicts and true conflicts in such a fashion as to uphold the application of local law. *See* Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966); Lilienthal v. Kaufman, 239 Ore. 1, 395 P.2d 543 (1964). Similarly, where courts engage in plain interest evaluation, *see* Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976), or the search for the better law, *see* Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973), a propensity to uphold local law is observed. Of course, there are exceptions; yet, the clear tendency is to apply local law. Indeed, it is difficult to distinguish in practice the so-called "new learning" in the field of choice of law from the ad hoc method of characterization used under the *ancien regime* of the First Restatement. *See, e.g.*, Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Levy v. Daniel's U-Drive Auto Renting Co., 108 Conn. 333, 143 A.163 (1928).

impacts that ought to be considered and evaluated as a part of the basic determination whether to provide a forum. The decision by the forum to exercise jurisdiction ought not to be made simply upon the basis of presence, domicile, or minimum contacts. Rather, those concepts should merely initiate the analysis. The court should extend the inquiry to ascertain in what manner a decision to assert jurisdiction will affect the legal interests of involved parties. To generalize, one would suspect on an intuitive level that resolution of a choice of law controversy, occasioned largely as a collateral consequence of the forum selection process, would "meaningfully affect" the inquiry whether jurisdiction exists. On the other hand, the formal rules for service of process or style of pleadings used by a jurisdiction would not, in nearly every case, appear to have a "meaningful impact" upon the forum selection inquiry. Of course, many factors that would affect the jurisdictional decision will not be known at the time the jurisdictional question is to be resolved. Such a situation is unavoidable. Yet, the inability of the parties or the court to have the capacity to perceive *all* consequences of the jurisdictional decision does not mean that those consequences that are perceived ought to be ignored.

Since the interrelationship between the decision where geographically to decide the case and the choice of law decision is fundamental, the legal approach to resolving jurisdiction issues must be altered. Presently, the jurisdictional inquiry, under the compulsion of *Shaffer*, appears limited to consideration of the defendant's forum contacts in determining whether jurisdiction over the person of the defendant may be asserted. Choice of law doctrines, especially those that emphasize forum interests as the *sine qua non* of doctrinal analysis, often retain, however, a focus upon the plaintiff's forum contacts. In many cases, therefore, these two interrelated factors are separately measured and independently evaluated with the synergistic consequences to the parties often passing by the court unnoticed.

An example of judicial failure to recognize the synergistic relationship of jurisdiction issues and choice of law analysis may be found in the recent case of *O'Connor v. Lee-Hy Paving Corp.*[82] *O'Connor* involved the question of the post-*Shaffer* constitutionality of the *Seider* doctrine.[83] In *O'Connor*, an action was com-

82. 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978).

83. Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966) (action by New York residents arising from accident outside the state against nonresident defendants

menced in New York by a widow to recover for her husband's wrongful death. The incident giving rise to the claim arose in Virginia. The defendants were a Virginia corporation and one of its employees. The New York connections were plaintiff's residence and the situs there of the insurer's contractual obligation to defend and indemnify. The choice of law question involved the liability of a third party in tort notwithstanding that the plaintiff had received a workmen's compensation award. Virginia law barred the action while New York law did not.

The court sustained the constitutionality of the *Seider* doctrine by focusing upon the contacts of the purported "true" defendant, the insurance carrier.[84] The court noted that the insurance carrier was doing business in the forum and that the plaintiff's claim related to those activities.[85] Hence, insofar as due process analysis under *Shaffer* was concerned, the constitutional standard was satisfied and New York was a proper forum in which to entertain the claim.[86]

On the choice of law issue, the court found that New York law should be applied to resolve the question of liability in tort.[87] The decisional analysis, however, was somewhat obscured by the cursory fashion in which the choice of law issue was resolved. Several prior decisions had upheld the forum's application of local law to a *Seider*-type case where it was "foreseeable" that the insured would deal with forum residents as part of his or her usual course of business.[88] The foreseeability issue serves to tie the case to *Clay v. Sun Insurance Office, Ltd.*[89] *O'Connor*, however, did not posit its choice of law analysis upon foreseeability. Rather it based its decision upon section 183 of the Restatement (Second) of Conflict of Laws which provides: "A state . . . is not precluded by the Constitution from providing a right of action in tort or

in which jurisdiction was predicated on attachment of the defendants' interests in liability insurance policies issued by companies doing business in New York). *Seider* was constitutionally upheld in Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968), *adhered to en banc*, 410 F.2d 117, *cert. denied*, 396 U.S. 844 (1969).

84. 579 F.2d at 200–01.

85. *Id.* at 201–02.

86. In essence, the insured in a *Seider*-type case becomes a nominal defendant inasmuch as the insured is afforded the right to make a limited appearance and the *Seider* judgment carries with it no preclusive consequences to the insured, save for the disposition of "rights" to the insurance policies.

87. 579 F.2d at 205–06.

88. *See, e.g.*, Rosenthal v. Warren, 475 F.2d 438, 444 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).

89. 377 U.S. 179 (1964), discussed *supra* at notes 65–69 and accompanying text.

wrongful death by the fact that the defendant is declared immune from such liability to the plaintiff by the workmen's compensation statute of a sister state. . . ."[90] As the comments to section 183 make clear, however, that section's application is contingent upon there being a "sufficient relationship to the issue and to the person, thing or occurrence to make application of its law reasonable."[91] From all that appears in the court's opinion in *O'Connor*, this relationship is established by the mere fact that the decedent is a domiciliary of the state of New York. Such a holding would seem to be carrying a good thing a bit too far. Certainly, none of the illustrations to section 183 supported the application of New York law on the basis of the facts in *O'Connor*. In each illustration, some meaningful activity, such as the events leading to the formation of the employer-employee relationship or the injury itself, occurred in the state whose law was to be applied. Indeed, *O'Connor* is really the converse of the illustrations set forth in section 183. Each of those illustrations concerns the power of the state of injury to provide to a plaintiff a remedy in tort or wrongful death against a party who is immune from such liability under the law of another state. That was not the case in *O'Connor*. The Supreme Court did state in *Carroll v. Lanza*[92] that a state could apply its local law to hold a defendant liable for tort or wrongful death even though the defendant is declared immune from such liability by the workmen's compensation statute of a sister state under which the plaintiff has obtained, or could obtain, an award against another person. Nonetheless, when one looks beneath the generalization, one discovers that in *Carroll* it was the state of injury that abolished immunity, hence, there was a sufficient relationship to allow application of that state's rules regarding tort liability.

In addition to its analytical deficiencies, the result in *O'Connor* is flawed by its disparate treatment of the jurisdiction and choice of law issues. However compelling the court's arguments as to each issue, the net result of the decision was that a lawsuit which was almost entirely the concern of Virginia was litigated in New York under New York law. The deleterious impact of these decisions on the defendant was largely ignored by the court. And while arguments might be offered to justify this anomalous result, none were tendered by the decision. It is suggested that in the

90. RESTATEMENT (SECOND), CONFLICT OF LAWS § 183 (1971).
91. *Id.*
92. 349 U.S. 408, 412–13 (1955).

aftermath of *Shaffer* this linear analysis is no longer proper. *Shaffer*'s emphasis upon fairness as a due process defense to the assertion of jurisdiction suggests that the *total consequences* of litigating in the forum must be considered. This not only implicates notions of convenience but also considerations of choice of law and the consequences of claim or issue preclusion.

II. THE REALIZATION OF AN INTEGRATED THEORY OF FORUM ALLOCATION

Any attempt to integrate the due process and full faith and credit clauses into jurisdictional analysis must begin with the realization that each clause of the Constitution looks primarily to and promotes different goals. The full faith and credit clause[93] seeks to further national unity by binding the courts of the several states into one, enhancing the efficient administration of justice.[94] The due process clause,[95] as presently construed, recognizes that state territorial boundaries do matter and that rather than enhancing the efficient administration of justice, forum allocation doctrine should look to the just and fair allocation of judicial authority within the confines of a limited territorialism.[96] While there is some accord between the two clauses in the sense that inefficiency tends to beget unfairness, the prime goals of each clause, as applied to jurisdictional analysis, appear to be at cross purposes.

Notwithstanding this inconsistency of goals, the American legal system has traditionally sought to accommodate and harmonize the due process and full faith and credit clauses. Indeed, no reason exists why, in the absence of textual evidence or policy compulsion to the contrary, one of the clauses of the Constitution ought to control forum allocation decisions to the exclusion of

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93. The text of the full faith and credit clause appears at note 12 *supra*.

94. *See* text accompanying note 77 *supra*.

95. The "due process clause" of the fourteenth amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. XIV, § 1.

96. The term "limited territorialism" is used in a descriptive sense. In the aftermath of *Shaffer*, state territorial boundaries serve as convenient benchmarks to provide an easy method of observation and calculation of data by which the forum selection process proceeds. *Shaffer* does not appear to imply any return to the theme of normative territorialism, *i.e.*, territorialism itself defining the nature of the legal system, as found in Pennoyer v. Neff, 95 U.S. 714 (1878). *See* Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; *see also* note 121 *infra*.

other relevant clauses. The challenge thus presented is to seek some methodology by which the inherent values of both the due process and full faith and credit clauses may be realized.

A. *Preserving the Current Methodology for Harmonization of the Due Process and Full Faith and Credit Clauses*

In *Shaffer*, the Court intimated that the integrated theory of jurisdiction espoused was not an "all or nothing" approach. The quality of forum-related contacts could give rise to an ever-increasing power on the part of the forum to exercise a greater degree of jurisdiction over the person of the defendant. For example, isolated contacts involving property in the forum might authorize a limited personal judgment equal to the value of that property.[97] Thus, Justice Marshall observed in *Shaffer*:

> The Full Faith and Credit clause, after all, makes the valid *in personam* judgment of one State enforceable in all other States. . . . Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a state where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.[98]

The thrust of this observation appears to be that, while previously in a type II *quasi in rem* action the underlying claim would lie hidden under the fiction that the action was against a "thing" located in the state, under the integrated theory espoused in *Shaffer*, the claim itself would constitute the action. The "thing" located in the state would constitute a forum contact which comprises part of the total relationship between the nonresident, the cause of action, and the particular forum. As such, Justice Marshall's statements indicate that an *in personam* judgment, limited to the value of the "thing" located in the forum, could be

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97. *See* note 58 *supra*. Professor Silberman observed:

> It is quite possible, however, that certain minimum contacts that are insufficient when standing alone in an in personam action might pass the constitutional threshold in a quasi in rem action when coupled with the attachment of the defendant's property in the state. For example, in this country the citizenship or residence of the plaintiff, without more, has never been adequate to confer jurisdiction over a nonresident defendant not present in the state. Yet perhaps the plaintiff's residence together with some other contact like the physical presence of the defendant's property in the state or a connection between the claim and the property might be enough to trigger the lower (or quasi in rem) level of a newly fashioned *International Shoe* inquiry. Certainly nothing explicit in *Shaffer* precludes these possibilities.

Silberman, *supra* note 70, at 72 (citations omitted).

98. Shaffer v. Heitner, 433 U.S. 186, 210, 210–11 n.36 (1977).

obtained and enforced either against property of the defendant in the forum state or against other property of the defendant in a sister state. And as the number and quality of contacts increases, full jural power over the person of the nonresident could be exercised without limitation to the value of any property of the nonresident defendant in the forum.[99]

This hierarchical approach suggests that the minimum contacts test of *International Shoe*[100] may require a greater degree of forum contacts in one type of case than in another. An example is a recent Second Circuit decision, *Intermeat, Inc. v. American Poultry, Inc.*[101] Intermeat, a New York corporation, brought suit in New York to recover damages from American Poultry, an Ohio corporation, for the wrongful rejection of a shipment of meat. The trial court held that it lacked *in personam* jurisdiction over

99. *See, e.g.*, Cornelison v. Chaney, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976); Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); *cf.*, Intermeat, Inc. v. American Poultry, Inc., 575 F.2d 1017 (2d Cir. 1978) (discussed *infra* at text accompanying notes 101–03).

100. International Shoe Co. v. Washington, 326 U.S. 310 (1945). In *International Shoe*, the Court made the conceptual break with Pennoyer v. Neff, 95 U.S. 714 (1878), when it reformulated jurisdiction theory to allay extraterritorial exercise of jurisdiction as a matter of course. The Court stated the test thusly:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."
>
> . . . .
>
> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less . . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.

326 U.S. at 316, 319.

International Shoe teaches, and *Shaffer* confirms, that the test for finding jurisdictional authority over nonresidents lies in the fairness and reasonableness of the exercise of that authority. These standards, imprecise though they are, have important consequences because they demand of courts a total, thorough analysis of not only the defendant's relation to the forum but also the consequences, to the defendant, of exercising jurisdiction. It hardly suffices under a fairness test to suggest that the test can be satisfied by only a partial examination of the question, an examination only of what the defendant has done, without an inquiry into the consequences to the defendant should jurisdiction be exercised. It is an inadequate analysis which stops when the defendant is required to "come" to the forum and does not examine what the defendant is going to be required to do, and what the consequences of those acts are, once he or she does come *and* defend.

101. 575 F.2d 1017 (2d Cir. 1978).

American Poultry, apparently on statutory grounds. However, Intermeat was allowed to attach a debt owed American Poultry by the Great Atlantic & Pacific Tea Co., a corporation doing business in New York, which exceeded the amount of the claim. The forum contacts were substantial, involving numerous contracts for the sale of imported meat between the parties, prior agreements between the parties to arbitrate disputes in New York, and substantial sales of meat by American Poultry to persons doing business in New York. Nevertheless, the court specifically limited the question before it to the propriety of jurisdiction by attachment:

> The difference between an *in personam* jurisdiction and a jurisdiction by attachment of a debt is that, in the former case . . . we would have to decide the continued strength of the "doing business" concept in New York law, and hence decide whether the acts done in New York by American Poultry were enough to support such jurisdiction under N.Y.C.P.L.R. § 301, as well as enough to satisfy the test of *International Shoe*. On the other hand, in dealing with jurisdiction based upon an attachment, the test is narrower. The test is not whether the defendant is "doing business" in New York, a concept which a state, if it wishes to, is still free to assert as a minimum requirement, but whether there are sufficient contacts to make it fair and just that the foreign corporation be required to come to New York to defend the action that was begun by attachment.[102]

The approach used by the court raises some interesting questions. For example, would a defendant in an attachment proceeding be required to pose any counterclaims that arise out of the same transaction or occurrence that gave rise to the plaintiff's claim in the attachment proceedings? If the defendant failed to do so, would the counterclaims be lost by way of rule preclusion (failure to assert a compulsory counterclaim) or claim preclusion under the doctrine of res judicata?

Professor Carrington has implied that under such circumstances no compulsory counterclaim (and by implication, no claim preclusion) should be mandated:

> The attractions of the compulsory counterclaim rule are substantially dissipated when it is applied to nonresident defendants whose relation to the forum may be very attenuated in light of emerging concepts of personal jurisdiction. . . . [I]t would seem proper for courts to recognize the extra harshness of the total litigation concept as applied to interstate situations and to mitigate it by the use of a more conservative forum

102. *Id.* at 1022 (citations omitted).

rule.[103]

Professor Carrington's position has been criticized on the ground that he failed to adequately account for the fact that compulsory counterclaims are generally required to arise out of the transaction or occurrence that gave rise to the plaintiff's claim.[104] Hence, a factual nexus between the nonresident, his or her claim, and the forum could in most instances be properly presumed to exist. This would justify, on principles of utility, the establishment of a rule of general application such as a rule requiring the assertion of all common transaction or occurrence claims. Such an observation would appear to hold true for jurisdictional analysis in the post-*Shaffer* era inasmuch as the underlying claim to what was heretofore an *in rem* action now constitutes the basis for the limited *in personam* action. *Shaffer* thus intensifies the problem: to the extent jurisdiction over the claim may be exercised with respect to the claim on the basis of fewer contacts than would otherwise sustain full *in personam* jurisdiction,[105] the basic fairness question whether to require the nonresident to do more than defend his or her interest is heightened.

Another aspect of the problem of preclusion is suggested by inquiry into what collateral consequences attach to the judgment obtained by the plaintiff if the attachment is less than the claim and the nonresident has appeared and defended. The question arises whether it is consistent with elementary notions of fairness to apply, in limited *in personam* actions, the hard and fast rule that all issues determined by a valid judgment are precluded, subject to constitutional limitations, by the law of the state where the judgment is rendered.[106] Insofar as the rendering state is concerned, if the forum can give its judgment issue preclusion effect, this would convert what in form was a limited *in personam* action to what in substance is a full *in personam* action. A similar consequence may be realized if the same were done by a sister state. Indeed, it is not unusual that issues actually and necessarily de-

103. Carrington, *Collateral Estoppel and Foreign Judgments*, 24 OHIO ST. L.J. 381, 390–91 (1963).

104. *See* R. CRAMTON, D. CURRIE & H. KAY, *supra* note 72, at 738.

105. As noted by Professor Silberman, "If the minimum contacts test for *quasi in rem* actions is equivalent to the one used for personal jurisdiction, then the *Shaffer* Court probably eliminated *quasi in rem* jurisdiction as we have known it." Silberman, *supra* note 70, at 71–72. Post-*Shaffer* decisions have to date indicated that there is no equivalency; the minimum contacts standard for attachment actions is less than that requires for full *in personam* actions.

106. *See* RESTATEMENT (SECOND), CONFLICT OF LAWS § 95, comment g (1971).

cided by a judgment of a court having limited jurisdiction are foreclosed from reconsideration in a sister state.[107]

Traditionally, problems attendant to the preclusion consequences of *in rem* or *quasi in rem* judgments were constrained by the narrow definition of "cause of action" which attached to those proceedings. The term "cause of action" was limited to defining only the *res* before the court.[108] As such, neither the plaintiff's nor the defendant's claims were merged into the judgment, nor were fact adjudications upon which the judgment was based deemed to be conclusive for purposes of establishing an estoppel.[109] It is doubtful, however, whether this narrow definition of a "cause of action" survives *Shaffer*. The rejection of the presence of property as an adequate and independent ground for the assertion of jural power to affect the legal interests of nonresidents, coupled with the Court's emphasis that the claims upon which relief is requested have a factual nexus with the forum,[110] belie any attempt to resurrect the "cause of action" formula that sustained the *in personam-in rem* dichotomy of the *Pennoyer* era. Thus, courts are now faced with the prospect of determining what faith and credit *must* be given and what degree of recognition *may* be given to a judgment disposing of a "cause of action" where that judgment is predicated upon a jurisdictional base of less than sufficient forum contacts to warrant the exercise of traditional *in personam* jurisdiction over a nonresident.

It is the state of judgment rendition which defines "cause of action" for purposes of claim or issue preclusion under the full faith and credit clause.[111] If a state has a compulsory counter-

107. *See* text accompanying notes 113–20 *infra*; *see also* note 64 *supra*.

108. *See* Note, *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909, 949–50 (1960).

109. *Id.*

110. Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

111. *See* note 60 *supra*; *see also* RESTATEMENT (SECOND), CONFLICT OF LAWS § 95 (1969). The Restatement (Second) of Judgments § 61 (Tent. Draft No. 1, 1973) has moved away from attempting to provide rules for categorizing the concept of "cause of action" as a unit of measure for purposes of merger or bar in favor of expressing factors which the court should consider:

> What factual grouping constitutes a "transaction" and what groupings constitute a "series" [transaction and series being the putative units of measure], are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Id. § 61(a). Nevertheless, it is the law of the state of judgment rendition that controls the question of the faith and credit to which the judgment is entitled in a sister state. Hence, analysis must return to the basic question of the extent to which the integrated theory of

claim rule that applies to the situation, or if the state would provide the judgment so rendered with the attributes of claim and issue preclusion, the full faith and credit clause would arguably transmute a limited personal action into a full *in personam* action insofar as the question of preclusion by judgment is concerned. This results because the failure to comply with compulsory claim requirements as effectively bars their later assertion as if they had in fact been presented and denied as part of a full *in personam* adjudication. Moreover, under traditional analysis, the result seems unimpeachable. The forum has jurisdiction over the *person*—the only type of jurisdiction *Shaffer* recognizes. Consequently, the full faith and credit clause demands recognition of the lawful judgment thus rendered. Since jurisdiction over the person did exist, due process objections to affording the judgment full faith and credit are largely stilled.

The problem presented is that the *scope* of judgments rendered under an hierarchial approach to jurisdictional analysis is unknown. The problem does, however, resemble the conundrum posed by the intersection of the limited appearance and the doctrine of issue preclusion. Where a court *can* compel a nonresident to litigate a claim, and he or she does so litigate (which he or she must do or risk losing any interest in the resolution of the claims arising out of the transaction or occurrence giving rise to plaintiff's actions), one must discern the nature and scope of such judgments in order to address the problem of the impact of claim and issue preclusion upon those judgments. It is not questioned that such judgments are entitled to some faith and credit. The question is how much is too much and how little is too little. With the increasing tendency to simplify the interstate recognition of judgments, creation of an hierarchial system of *in personam* jurisdiction could lead to a functionally more expansive long arm because the jurisdiction issue would merely serve as the tip of the iceberg. Submerged below, out of sight, would lie the same judgment consequences to the parties as would be occasioned by an exercise of full *in personam* adjudication. This would seem, based upon the rationale and result of *Shaffer*,[112] to be more than the Court intended by its decision.

In addition to the question what an enforcing state *must* do

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jurisdiction espoused in *Shaffer* affects the power of a state to give its judgments preclusive effects.

112. *See* Shaffer v. Heitner, 433 U.S. 186 (1977), and text accompanying notes 3–9 *supra*.

with a sister state's judgment, there is the problem of what it *may* do. With *Shaffer*'s transmutation of the *quasi in rem* action into some form of *in personam* action, one would reasonably expect to see a greater incidence of appearances by nonresidents to defend their interests against claims asserted against them. This in turn raises the question of what preclusion consequences such an appearance might generate and whether the recognition of preclusion consequences over the minimal demands of the full faith and credit clause poses constitutional problems. The due process objection to recognition of preclusion consequences in such circumstances is exemplified by *Harnischfeger Sales Corp. v. Sternberg Dredging Co.*[113] The plaintiff sold a dredge to the defendant taking notes secured by a chattel mortgage for a part of the purchase price. Later, the plaintiff commenced a suit to enforce the mortgage and prayed for a personal judgment of $16,000 on the notes. The defendant appeared and moved to dismiss for want of jurisdiction. The motion was denied and the defendant contested the claim on the merits alleging that the dredge was defective and did not meet warranties. The trial court rendered judgment for the plaintiff; however, the Louisiana Supreme Court limited the judgment to the enforcement of the lien, holding that personal jurisdiction did not lie over the defendant. The plaintiff then asserted a second action against the defendant in Mississippi and attempted to plead the prior judgment in bar against the defendant's affirmative defense of defective machinery and breach of warranty. The trial court struck the plea and judgment was rendered for the defendant. On appeal, the Mississippi Supreme Court reinstated the plea and granted summary judgment for the plaintiff.[114]

Thus, even though Louisiana found that it had only such jurisdiction as to warrant foreclosing the interest of the nonresident in the chattel situated in the state (the dredge), Mississippi, through the use of collateral estoppel, gave the Louisiana judgment the same effect as if it had been rendered on the basis of *in personam* jurisdiction. If the fairness of that result can legitimately be debated because it allowed the plaintiff to evade the limitations surrounding Louisiana's assertion of jurisdiction,[115] should a fairer

113. 189 Miss. 73, 191 So. 94 (1939).

114. *Id.* at 97–98, 191 So. at 99.

115. *See* Taintor, *supra* note 25, at 226. ("It is submitted that an attempt to force defendant to choose between abandonment of his property without defense and submission to the court for all purposes contravenes . . . due process of law."). In essence, all that the

decision necessarily result simply because traditional terminology is eschewed, but the results realized by the former doctrine are retained? In other words, a limited personal jurisdiction doctrine, when coupled with the readiness of a state to give the judgment greater effect than would the rendering court, raises the same problems that the old *in rem* jurisdiction doctrine did when it was coupled with the right to make a limited appearance. A litigant must not only consider what effect the rendering state would give the judgment since the enforcing state is required under the full faith and credit clause to give the judgment the same effect, but also must consider whether the enforcing state would give the judgment more credit than the clause required. Indeed, abolition of traditional *in rem* jurisdiction may put the nonresident in an even greater quandary than before. Formerly, in the absence of a right to enter a limited appearance to which no collateral estoppel consequences attached, a nonresident was forced to choose between abandonment of his or her forum property without defense or submission to the forum for all purposes. But at least the nonresident could weigh the economic consequences of his or her decision. After *Shaffer*, the nonresident still faces the crucial question whether to present his or her jurisdictional challenge in the forum and defend on the merits or abandon all defenses to the forum action and preserve the jurisdictional question for review when enforcement of the judgment is sought. The quandary is all the more serious because forum contacts formerly capable of characterization in a manner to sustain the exercise of *in rem* jurisdiction so that both the jurisdiction of the rendering and of the enforcing courts could be preserved, must now be integrated into a jurisdiction theory that logically demands an either/or choice between the two courts in the sense that either the court has the power to resolved the entire controversy or it does not.

A superficially plausible mechanism for avoiding this problem is for the rendering state to simply deny actions (predicated upon less than sufficient forum contacts to warrant the exercise of *in personam* jurisdiction) any claim or issue preclusion effect. If a forum voluntarily undertakes to so limit its judgments or is compelled by fourteenth amendment due process constraints to do so, this at least obviates the full faith and credit problem. The enforcing forum need give only such faith and credit to the judg-

plaintiff in *Harnischfeger* lost was the immediate opportunity to execute on all property of the defendant to the full extent of his claims, a meaningless concession if all of the defendant's Louisiana assets had been attached.

ment of the rendering state as the rendering state itself would give to the judgment. Of course, such a procedure simply assumes that for all cases the interest of fairness to the parties outweighs efficiency of judicial administration. Such an assumption may be readily criticized as not only being unestablished but also overinclusive. Nonetheless, were a state to disclaim any interest in adjudicating interests other than in the specific property before the court, the full faith and credit clause would not *require* another state to give issue preclusive effect to the judgment of the rendering state. However, while the courts cannot give less faith and credit to the judgment than would the rendering state, due process constraints may not impede the courts from giving *more* credit than the clause requires (as *Harnischfeger* indicates). The hope that foreign jurisdictions would respect the disclaimer may be unavailing.[116] Moreover, as all assertions of jurisdiction would be insulated from claim or issue preclusive consequences within the forum, this would encourage nonresidents to appear. A subse-

116. In *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969), the court viewed the *Seider* doctrine, *see* note 83 *supra*, as insulated from constitutional attack because New York, in following that doctrine, granted to the nonresident the right to make a limited appearance to which the forum could not attach issue preclusion consequences. Yet, as noted by the court:

> Whatever the right rule may be as to *quasi in rem* judgments generally, we think it clear that neither New York nor any other state could constitutionally give collateral estoppel effect to a *Seider* judgment when the whole theory behind this procedure is that it is in effect a direct action against the insurer and that the latter rather than the insurer will conduct the defense. To be sure it may be cold comfort to a nonresident defendant to have our assurance that if some state should be so misguided as to consider a New York *Seider* judgment as concluding him, he will be able to have this ruling overturned by the Supreme Court of the United States. But we cannot fairly hold that New York has denied due process merely because of the possibility that some other state may do so.

Id. at 112. It is not necessarily clear, however, why due process ought to preclude application of the doctrine of collateral estoppel by a sister state. Even if the *Seider* doctrine is viewed as a judicially begotten direct action statute, *see, e.g.*, O'Connor v. Lee-Hy Paving Corp., 437 F. Supp. 994 (E.D.N.Y. 1977), *aff'd*, 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978), emerging notions of privity and adequacy of representation, coupled with the substantial identity of issues between the first and latter actions, might constitute a proper basis upon which to give estoppel consequences to a *Seider*-type judgment. *See, e.g.*, Cauefield v. Fidelity & Cas. Co., 378 F.2d 876 (5th Cir.), *cert. denied*, 389 U.S. 1009 (1967) (plaintiffs who sought relitigation of defendant's liability for desecration of a cemetery barred by a prior action to which they had not been parties but in which they had appeared as witnesses); *see generally*, Comment, *The Expanding Scope of the Res Judicata Bar*, 54 TEXAS L. REV. 526 (1976); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 85 (Tent. Draft No. 2, 1975). It must be acknowledged that the *Cauefield* decision has not received widespread acceptance. *See, e.g., Humphreys v. Tann*, 487 F.2d 666, 670 (6th Cir. 1973) (characterizing *Cauefield* as being confined to the "unusual facts of that case"). Of course, where the parties are the same in both actions, problems attendant to the use of judgment preclusion by or against non-parties are not present.

quent court, faced with the identical claims and the identical parties, would then have to exercise great restraint to avoid giving any recognition of the former adjudication. In an era of exceedingly overcrowded court calenders, such an expectation may be largely wistful.

On the other hand, the argument may be made that the fourteenth amendment not only imposes constitutional limitations on what attributes the rendering state could give the judgments, but also limits, under due process standards, the degree of recognition, by way of comity or internal operational efficiency, that the enforcing state could give the judgment.

Such an approach would enable the states to retain their jurisdiction over property within the state without prejudicing the interests of nonresidents by the extraterritorial impact of the judgment. However, it is debatable whether reconstitution of the *in rem* concept is prudent. Associating *in rem* considerations directly with the full faith and credit clause would result in the application of two different doctrines to the same problem. For each case, courts would be required to (1) measure forum-related contacts, forum interests, and concepts of fairness to determine whether jurisdiction could be exercised over the nonresident, and (2) characterize the action as *in personam* or *in rem* for the application of the jurisdiction's rules of claim and issue preclusion. *Shaffer* accomplished very little if the *in rem* concepts, brought into the case through use of a two-tiered hierarchical approach, has simply been moved from the front door to the servant's entrance for consideration.

There is a further argument against an approach that would limit, by way of comity or internal operational efficiency, the degree of recognition an enforcing state could give the judgment. Such an approach would be based on two required findings: first, that it violates due process of law for a state to treat a claim or defense as merged or barred by a sister state judgment which was rendered by a court which had jurisdiction over the nonresident defendant and where the claim or defense sought to be precluded arose out of the same transaction or occurrences that provided the rendering court with jurisdiction over the matter in the first instance; and second, that it violates due process for a sister state to treat an issue as foreclosed from relitigation where that issue was actually litigated in a prior action which resulted in a judgment rendered by a court which had jurisdiction to affect legal interests of the nonresident defendant. It is not an overstatement to suggest

that such a construction and application of the due process clause would constitute a significant expansion of federal involvement in the administration of state judicial proceedings that would far transcend previous Supreme Court decisions in this area.[117] In essence, to give effect to one state's decision to adjudicate a controversy, where the forum contacts are insufficient to sustain the exercise of full *in personam* jurisdiction, would require that a sister state, even the state of the defendant's residence, be precluded from furthering its goal of avoiding multiple, recurrent litigation of the same claim.[118] This simply begs the question of why the fourteenth amendment is construed so as to allow the plaintiff-creditor to sue the defendant-debtor wherever the plaintiff can locate assets sufficient to satisfy bare constitutional minimums regarding the exercise of jural power, and to do so without fear of adverse consequences such as merger (should plaintiff's claim be greater than the attachment) or bar (should it be less).[119]

Correspondingly, if the defendant appears, why should the fourteenth amendment now be construed to allow him or her to relitigate his or her liability? If the defendant does not appear when the fourteenth amendment says that the state may compel defendant to do so to protect his or her property,[120] why should the fourteenth amendment protect defendant from the consequences of that failure? Does the quantum of forum contacts bear any significant relationship to the question whether relitigation

117. While it has been argued that due process constraints militate against giving a sister state judgment greater effect than it would have in the rendering state, *see, e.g.*, Taintor, *supra* note 25, the impact of such a doctrine has not been critically examined. Rather, positions are drawn on the basis of the basic fairness or unfairness of forcing the nonresident to make the election to appear or to forfeit. In other words, analysis has been limited to the circumstances surrounding the election rather than extended to include the judgment consequences of the election. Of course, prior to *Shaffer* the latter consequences were subsumed in the former.

118. It should be observed that in analogous cases the courts have held that representation by another, coupled with an opportunity to involve oneself as a party litigant, can create issue preclusion. *See* note 116 *supra*; *see also* Provident Tradesmen's Bank and Trust Co. v. Patterson, 390 U.S. 102, 114 (1968) ("Of course, when Dutcher [the absent party] raises this defense he may lose . . . on the ground that the issue is foreclosed by Dutcher's failure to intervene in the present case. . . .") (dictum).

119. Although an adverse judgment against the plaintiff is a possibility even in default proceedings, the likelihood of such a result (or of such a decision on the merits) is exceedingly slim. While no empirical proof exists to support the claim, the intuitive position is that even if one failed to prove his or her case before a judge in a default proceeding, the court would invariably be willing to treat the subsequently entered dismissal as "without prejudice" to the maintenance of another action.

120. *See, e.g.*, Intermeat, Inc. v. American Poultry Inc., 575 F.2d 1017 (2d Cir. 1978); Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977).

ought to be tolerated? This is more than merely an academic question. A party to an action who has lost the certainty of judgment consequences provided by pre-*Shaffer* decisions must now evaluate the judgment consequences under the integrated theory espoused in *Shaffer*. Unfortunately, *Shaffer* itself provides no guidance to the proper resolution of the problem. Indeed, *Shaffer*'s reliance upon forum contacts as part of its modified view of territorialism may be counterproductive.[121] No meaningful difference exists insofar as the question of preclusion is concerned between situations where minimal forum contacts allow the exercise of a constrained jurisdiction and situations where the quantum of contacts allows an unrestrained exercise of jurisdiction. Rather, a court should focus upon those factors which truly bear upon the objectives of barring relitigation where a party has already litigated or intentionally bypassed an opportunity to litigate. Reliance upon the quantum of contacts submerges the social goals behind precluding repetitive litigation and causes courts to lose sight of what ought to be the main focus of inquiry—did the nonresident have a full and fair opportunity to litigate the issues involved in the first action, coupled with an interest in fully litigating the questions there at issue?[122] The finding that the court in the first action has jurisdiction over the parties only begins the analysis; it does not conclude it as an hierarchical approach would suggest.

In summary, *Shaffer*'s radiations will have a profound effect upon questions of judgment preclusion due to its insistence that

121. Territorialism is a concept based upon the recognized power of each sovereign entity to affect changes in legal interests of persons or property within its borders. Territorialism has often been equated with physical power. *See, e.g.*, McDonald v. Mabee, 243 U.S. 90 (1917) ("The foundation of jurisdiction is physical power."). In the modern era, territorialism may possess a more constrained interpretation. *See, e.g.*, Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94 (1976):

> Because states are defined territorially, and because most people are comfortable with the proposition that it is a state's legitimate business to attach rules to matters or persons having a genuine connection with its territory, a power limitation based on territoriality makes sense. If the rule the state seeks to impose applies to an event within the state's territory, or to a person who has some relatively stable relationship with the state (such as residence, domicile, or place of business), an observable link exists to justify the exercise of power.

Id. at 97. The modern view of territorialism is based more on the justification to act than the naked physical ability to act. As such, the main point of distinction today between territorialism and the reasonable relationship test of *International Shoe* is the intensity of the nexus between the nonresident and the forum, with a more liberal standard of sufficiency employed under the reasonable relationship test.

122. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 (Tent. Draft No. 1, 1973).

courts treat assertions of jurisdiction for what they are—proceedings against the legal interests of persons. Consequently, in deciding whether to exercise jurisdiction, a court ought to consider whether, under the fairness rationale of *Shaffer*, it is appropriate to subject the nonresident to the jurisdiction of the forum's courts and to bind him or her by way of preclusion by judgment.

This "fairness" test will necessarily be broad and it would be foolhardy now, or perhaps ever, to attempt to state its limitations. As Professor Michelman has noted, fairness resists being cast into a simple, impersonal, succinct formula.[123] The sense of the test is more intuitive than legal. A more definite method of forum calculus would be desirable, yet, until such a calculus is perfected, courts must nonetheless begin to estimate and factor into their decisionmaking process the final judgment consequences (claim and issue preclusion) of their decision to assume jurisdiction.

B. *The Proper Relationship Between Choice of Law and Forum Allocation*

What law will be applied to a particular controversy is a matter of no small concern to the parties. Choice of law questions become particularly relevant in the situation where application of the law of a particular jurisdiction will redound to the tactical benefit of one of the litigants. Questions of jurisdiction and choice of law interrelate in situations where adjudication of the controversy in one place as opposed to another will be outcome-determinative or at least to some significant extent outcome-influencing. The likelihood of a different result turning solely upon forum selection has largely been avoided by many modern choice of law theorists.[124] Rather, the problem is characterized as unavoidable and unresolvable.[125] In the absence of a reasoned basis for permitting forum shopping,[126] the wisdom of setting aside substantive interests due to a collateral decision regarding where geographically the case may be adjudicated is questionable at best. Perhaps Professor Currie was correct in his view that resolution of true conflicts could not be undertaken by the judiciary through choice

123. *See* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1250 (1967).

124. *See* Currie, *supra* note 73, at 261-68, B. CURRIE, *supra* note 73, at 119-27.

125. *Id.*

126. *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1285 n.74 (1977).

of law methodology.[127] This does not, however, suggest that the true conflicts case is properly decided, *sub silentio*, through the means of jurisdictional analysis. To focus upon jurisdictional analysis and ignore the choice of law consequences of forum selection is to act like the spider who with his web catches the fly and lets the hawk go free. The choice of law resolution will inevitably be molded and shaped by the decision to assert jurisdiction; yet, too often the scope of legal analysis has not been extended to catch the prey.

This relationship between jurisdiction and choice of law is both synergistic and basic. Nevertheless, it has generally received little attention from the courts.[128] Where some attention has been given to this relationship, it has generally been limited to an observation that similar, legally significant factors may support or undermine the assertion of jurisdiction or application of local law. Courts have suggested that the quantum of forum contacts necessary to support the assertion of jurisdiction over a nonresident is less than,[129] or greater than,[130] that necessary to support the application of the forum's law or the law of a concerned state. This same two-tiered evaluation of forum contacts has been expressed by commentators.[131] What such discussions ignore is that juxtaposing the forum contacts required under the alternative standards of jurisdiction and choice of law is not the same as evaluating the synergistic effects of the two concepts.

For example, Professor Silberman has argued that:

> The *Hanson* [*v. Denckla*, 357 U.S. 235 (1958)] Court's implication, one apparently reasserted in *Shaffer*, is that more contacts with the forum state are needed for jurisdiction than for choice of law. I suggest that this implication is counterintuitive. The impact of a conflict of laws decision more seriously affects the rights of the parties than a decision on jurisdiction, which merely directs the parties to an appropriate forum in which to litigate their case. In *Hanson*, for example, two different state courts, one in Delaware and one in Florida, adjudicated an issue concerning the disposition of $400,000. Each court applied the law of its own state and each arrived at a different result, with the victorious Florida plaintiffs losing in

127. *See* Currie, *supra* note 73, at 261–68; B. CURRIE, *supra* note 73, at 119–27.

128. *See* Ehrenzweig, *A Proper Law in a Proper Forum: A Restatement of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340, 350 (1965); *see also* Comment, *At the Intersection of Jurisdiction and Choice of Law*, 58 CALIF. L. REV. 1514 (1971).

129. *See* Henry v. Richardson-Merrell, Inc., 508 F.2d 28, 36 n.18 (3d Cir. 1975).

130. *See* Shaffer v. Heitner, 433 U.S. 186, 216 (1977).

131. *See* Silberman, *supra* note 70, at 82.

> the opposite posture in Delaware. I am confident that, given the choice, the Florida plaintiffs would rather have litigated in a Delaware court applying Florida law than in a Florida court applying Delaware law.[132]

Professor Silberman's interpretation of *Hanson* is well reasoned. However, in situations where one of the parties is likely to be prohibited as a practical matter from litigating in the alternative forum,[133] or where the preference for one forum over the other is predicated not only upon choice of law considerations but also upon practical factors relating to convenience of parties and witnesses and ability to present the case to a trial court, the choice of law issue may lose its priority. After all, from a plaintiff's perspective, some forum applying any law is preferable, intuitively, to no forum at all.[134] These alternatives are not advanced to undermine the suggestion that choice of law decisions often impact more greatly upon the interests of the litigants than geographic forum selection problems; rather, they point out that the solution is not necessarily simply to construct different quanta of proof that must be established to assert jurisdiction or apply local law—so many forum contacts for jurisdiction, so many forum contacts for choice of law.[135] The type of analysis necessary is one that directs courts to measure the total impact that the various jurisdiction and choice of law alternatives may suggest when a forum allocation issue arises. In other words, in a situation such as the one presented in *Hanson*, a complete forum allocation doctrine would require the court to measure the total impact and propriety of allowing a Delaware court to apply Delaware law to the controversy, as opposed to the total impact and propriety of allowing a Florida court to apply Florida law. Again, this analysis is not simply outcome-determinative in the sense that a different result compels the use of the forum's courts and the forum's laws. Rather, decisional consequences should be measured against the relationship between the involved fora and parties and the interests of the involved fora and parties in determining that a particular forum and rule of decision should be used.

This need to evaluate the whole impact of the exercise of jurisdiction exists because both the constitutional measure necessary to

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132. *Id.* at 82–83 (footnotes omitted).

133. *See, e.g.*, National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964).

134. *See, e.g.*, Cornelison v. Chaney, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976).

135. Nor is it suggested that Professor Silberman intended her remarks to be so construed. Professor Silberman's analysis is correct as far as it goes.

establish jurisdiction over a nonresident and that necessary to apply local law remains a minimal one.[136] Those factors which under *International Shoe*[137] permit a court to assert jurisdiction over a nonresident are inevitably the same factors which permit the forum to apply its own law. The criteria are simply evaluated from different perspectives, the defendant's forum-related contacts being used in traditional jurisdictional analysis while the plaintiff's relationship to the forum is often the focal point for choice of law analysis.[138] Yet, there is nothing inherent in the methodology of forum allocation which demands that state interests lose their relevancy when considered in connection with forum selection[139] or that forum-related contacts lose their relevancy when considered in connection with choice of law questions.[140] Unless the Court is prepared to reassess its decisions in *Clay*[141] and *International Shoe*,[142] the inescapable conclusion is that in the overwhelming majority of cases the question a court must address is whether, where the assertion of both jurisdiction and local law is on marginal grounds, it is fair in the constitutional sense for the forum to accept both aspects of the case for adjudication. In other words, where the assertion of jurisdiction or application of local law is, as to one of the factors, clearly appropriate, assertion of the other factor in the face of constitutionally minimal contacts may not make the totality of the forum's involvement unfair.[143] If neither factor is clearly established, the assertion of jurisdiction and application of local law is suspect because jurisdiction and choice of law operate together to produce a total impact that exceeds the individual effects that either can generate alone.

For example, assume: Seller, operating out of State *B*, sells through the use of catalogues which are obtained by residents of

136. *See* notes 65–92 *supra* and accompanying text.

137. International Shoe Co. v. Washington, 326 U.S. 310 (1945); *see* note 100 *supra*.

138. *See* text accompanying notes 82–92 *supra*.

139. *See* Fischer, *State Interests, Minimum Contacts, and In Personam Jurisdiction Under Code of Civil Procedure Section 410.10*, 12 U.S.F. L. REV. 387, 415–17 (1978).

140. *See* text accompanying notes 65–92 *supra*.

141. Clay v. Sun Insurance Office, Ltd., 377 U.S. 197 (1964); *see* text accompanying notes 65–71 *supra*.

142. International Shoe Co. v. Washington, 326 U.S. 310 (1945); *see* note 100 *supra*.

143. For example, where the defendant moved to the forum after the cause of action arose, the jurisdictional nexus between the forum and the defendant may be so strong that it ameliorates the application of the forum's law to an out-of-state transaction. *See, e.g.*, Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968). On the other hand, where the plaintiff is the party who has moved to the forum, the weak jurisdictional nexus militates against the application of the forum's local law. *See, e.g.*, Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

State *A*, including Buyer. Buyer orders goods from Seller and remits partial payment. Upon attempted delivery of the goods, Buyer states that he has no storage facilities available. Seller, to accomodate Buyer, has the goods placed in storage in State *B*. Later, Seller again attempts delivery. Buyer inspects and rejects the goods, asserting in good faith that they are nonconforming. Assume that the law of State *B* would treat Buyer's actions as an acceptance to which the right of rejection had lapsed. State *A* would not treat Buyer's actions as an acceptance and would consider a good faith belief that the goods were nonconforming to create a power of nonacceptance.

As shown by Diagram A, four alternative methods of adjudicating the dispute are possible if the forum resident commences the action.

Diagram A

	Local Law Applied	Foreign Law Applied
Action filed in State *A*	1. Resident Buyer v. Nonresident Seller	2. Resident Buyer v. Nonresident Seller
Action filed in State *B*	3. Resident Seller v. Nonresident Buyer	4. Resident Seller v. Nonresident Buyer

On the basis of the facts given, one would expect that a greater degree of forum contacts and measurable indicia of forum interest in the matter would be necessary to sustain the results in situations 1 and 3, inasmuch as in both cases the nonresident is obligated to come to the resident plaintiff and subject himself or herself to the local law of the forum. Consequently, fewer forum contacts or indicia of forum interest would be necessary in situations 2 and 4, as in those cases it is only the obligation to come to the resident plaintiff that is involved; the nonresident retains the application of his or her own state's law.[144] As between situations 1 and 2, the court must evaluate the total relationship between the nonresident and the forum as it relates to the claim before the court. The greater the relationship, the easier it will be to substantiate situa-

144. Of course, the law of the forum may be more advantageous to the nonresident than the law of his or her domicile. *See, e.g.*, Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974). Under such circumstances the nonresident will, of course, prefer to go to his or her opponent's state in the hope that the forum will apply its more favorable local law to the controversy.

tion 1 over situation 2, and situation 2 over requiring the plaintiff to go out-of-state and sue the adversary in the adversary's home state.[145] In effect, the remedy (or penalty depending on one's point of view) amounts to an exercise of the common law maxim *actor forum rei sequitur*, loosely translated as, "the plaintiff must pursue the defendant in the defendant's forum."

The value of the above exercise is that it shows in schematic fashion that controversies are problems with various aspects that do not exist in isolation but which influence one another. Thus, one does not (1) distinguish between situations 1 and 2 by first evaluating forum contacts as they relate to forum selection and then as they relate to choice of law determination, (2) evaluate each question independently, and (3) classify the problem by placing it in a particular pigeonhole. Such a procedure is unsatisfactory because it assumes that a nonresident's relationship to the forum and the forum's concern in the case differ between providing a forum and providing the rule of decision. Yet, with respect to the forum's own courts, the concerns are overlapping and often addressed by the same factors. A nonresident does not relate to a forum one way with respect to jurisdictional questions and another way with respect to choice of law problems. Rather, nonresidents engage in acts which affect forum residents and impact upon forum interests. It is out of these acts that legal consequences flow. And it is by an evaluation of those acts as a whole that the legal relationship between the forum and the nonresident should be created and defined. Jurisdiction and choice of law, at least in an age of parochialism and congressional benign neglect, constitute a total consequence to the nonresident. Thus, whether the nonresident can be compelled to go to the plaintiff *and* have

145. The latter possibility, of course, gives rise to four additional jurisdiction/choice of law alternatives:

Diagram B

	Local Law Applied	Foreign Law Applied
Action filed in State *A*	5. Nonresident Seller v. Resident Buyer	6. Nonresident Seller v. Resident Buyer
Action filed in State *B*	7. Nonresident Buyer v. Resident Seller	8. Nonresident Buyer v. Resident Seller

local law apply (situation 1), or can be compelled simply to go to the plaintiff (situation 2), or can safely await the plaintiff who must come to the defendant's forum turns upon the total evaluation of the factual relationship between the nonresident and the forum, measured against the legal relationship created by classification of the problem into one of the categories described in Diagram A.

However, if the facts are amplified, the relationship between the various categories is subject to change. Thus, if one adds the additional circumstances that the transaction was initiated by the resident buyer who requested the transmittal to him or her of the catalogue and who solicited the order, it now appears that situation 1 becomes much harder to justify than situation 3, for here the buyer's affirmative, aggressive conduct raises the level at which state intervention becomes appropriate. Consequently, the overall propriety of subjecting the nonresident to the forum's court with the correlative application of the forum's local law is diminished in situations where the need for state protection is more difficult to justify.[146] If application of forum law is of greater consequence than the mere provision of a forum, the alternative provided by situation 2 may be unsatisfactory. On the other hand, if the variations between the law of the competing jurisdictions are not of major concern, the provision of a convenient tribunal to a forum domiciliary may be sufficient.

Clearly then, total forum interests may vary. For example, where application of local law is important the forum has only two possible alternatives—application of local law in its own forum (situation 1) or the hoped-for application of its own law in the other forum (situation 6). Given that the other involved jurisdiction must be expected to have a parochial attitude with respect to the interests of its own residents, the forum's only real alternative is to evaluate the total fairness of using the category presented by situation 1. Therefore, if State *A* should find that the relevant forum contacts and state interests warrant the exercise of jurisdiction and are not outweighed by the prejudice suffered by the nonresident were he or she compelled to litigate in State *A*, those

146. Where the initiative for the transaction comes from a forum resident, the interest of the state in protecting its residents is lessened. The forum resident, having taken affirmative action to deal with the nonresident, can be said to have assumed the risk that any litigation connected with the transaction will be conducted outside the jurisdiction at a place more convenient to the nonresident defendant. *See* Fischer, *supra* note 139, at 420–24.

same forum contacts and state interests will invariably call for the application of local law. This is not to suggest that all choice of law questions are merely disguised jurisdictional questions or vice versa. What it does suggest is that a number of hard cases in which jurisdiction and choice of law issues are factually intertwined could be more profitably analyzed by recognizing the synergistic characteristics of the two doctrines and resolving any problems accordingly.

C. *The New Methodology Ushered in by* Shaffer

The most important result of *Shaffer* will be the fundamental changes it will produce in the way forum allocation decisions are *perceived.* In the context of this paper, two consequences arising from the jurisdictional perspective ushered in by *Shaffer* have been noted. First, *Shaffer*'s emphasis upon the relationship among the nonresident defendant, the controversy, and the forum negates the traditional use of jurisdiction theory to preserve the interests of sister states over the affairs and concerns of their own residents.[147] Determinations of the scope of judgments rendered which were easily orchestrated through the inventive use of *in rem* concepts[148] and constrained constructions of the term "cause of action"[149] can no longer be so facilely managed. Second, *Shaffer*, in continuing a process begun in *International Shoe*,[150] has further refined the jurisdictional test into one which closely approximates in scope and form the constitutional standards for choice of law applications.[151] Hence, since both the jurisdictional and choice of law tests proceed upon a basic foundation of due process fairness, there is little utility or value in treating the two concepts disparately. This view is enhanced when one realizes that the sole point of difference between the two concepts—that of perspective[152]—is generally subsumed by the tendency of courts to ignore the synergistic effect of resolving interrelated issues.

The effects of these observed consequences on post-*Shaffer* jurisdictional analysis may be more clearly seen in the factual set-

147. *See* notes 51–52 *supra* and accompanying text.

148. *See* note 53 *supra* and accompanying. text.

149. *See* note 23 *supra.*

150. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

151. *See* text accompanying notes 65–92 *supra.*

152. The difference is that jurisdictional questions are resolved from a perspective oriented toward measuring the defendant's forum-related contacts, while choice of law questions are often resolved from a perspective oriented toward measuring the plaintiff's relationship to the forum. *See* text accompanying notes 82–92 *supra.*

ting of *Cornelison v. Chaney*.[153] In *Cornelison*, the defendant, a resident of Nebraska, was involved in an automobile collision with the plaintiff, a California domiciliary, just on the Nevada side of the California-Nevada border. At the time of the accident, the defendant was en route to Long Beach, California, on one of approximately twenty business trips he made to California each year. The California court sustained the exercise of jurisdiction over the nonresident defendant.[154]

In reaching its decision, the court articulated a two-question test for determining whether to exercise jurisdiction on a minimum contacts premise over a nonresident: (1) whether the relationship between the nonresident and the forum is of such a systematic, continuous, and wide-ranging nature that jurisdiction exists over the nonresident as if he or she were domiciled within the forum,[155] or (2) whether jurisdiction over the nonresident exists because (a) the cause of action arises from or is in connection with the nonresident defendant's forum-related conduct; (b) it is fair under the circumstances to exercise jurisdiction over the nonresident; and (c) the forum has an interest in asserting jurisdiction over the nonresident.[156]

It should be noted that under the court's conventional analysis of the forum selection issues two important consequences of the decision to assert jurisdiction were ignored. First, because the court sanctioned the exercise of personal jurisdiction over the defendant, the defendant could be forced to assert claims for injuries (personal and property damages) in the California action that would be instituted on remand.[157] Second, the almost inevitable consequence of litigating the case in California, where the plaintiff was a California resident, California law would be applied to resolve the issues.

Several observations regarding these consequences are in order. First, in justifying its decision to assume jurisdiction, the California court noted that the plaintiff (a witness in her case) resided in California.[158] What the court did not note was that, as concerned any counterclaims, the defendant's witnesses were likely to

153. 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976).

154. *Id.* at 152, 545 P.2d at 269, 127 Cal. Rptr. at 354.

155. *Id.* at 147, 545 P.2d at 266, 127 Cal. Rptr. at 354.

156. *Id.* at 147–48, 545 P.2d at 266–67, 127 Cal. Rptr. at 354–55.

157. *See* text accompanying notes 97–105 *supra*; CAL. CODE CIV. PROC. § 426.30 (West 1977).

158. 16 Cal. 3d at 151, 545 P.2d at 269, 127 Cal. Rptr. at 357.

be anywhere but in California. Thus, where the focus was limited to the plaintiff's claims, the balance of hardships between litigating in California or Nevada could be seen as relatively even. Yet, had the defendant's potential compulsory counterclaims been considered, that balance would not have remained. When it is observed that the decision to assert jurisdiction itself makes the assertion of the counterclaims inevitable, the Court's balancing of hardships is somewhat diminished where the hardships imposed upon the defendant with respect to the litigation of counterclaims are ignored.

A second consequence of the decision to exercise jurisdiction was that California law would likely be applied to resolve the controversy.[159] The obvious objection is that the application of California law instead of Nevada law should not turn simply upon the placement of the litigation in the California court.[160] This objection is stronger when it is observed that the measure of forum interest used by the court to assert jurisdiction was the mere fact of plaintiff's California residency. Consequently, once having assumed jurisdiction on a theory of state interest, it is unlikely that the court would decline to apply forum law to resolve the controversy.

The problems associated with choice of law concerns are not, however, limited to the academic question of which law to apply. There is the functional problem of handling a case where California law will likely be applied to resolve the validity of plaintiff's claims while the law of another jurisdiction will be applied to the counterclaim. Unless the forum adopts a choice of law theory predicated upon pure protectionism of local residents or officious intermeddling into the affairs of nonresidents, there seems to be little reason for the application of California law to a dispute brought by a nonresident which arose outside the forum.[161]

Although it cannot be said that the result in *Cornelison* would have been different had these considerations been reviewed by the

159. Where California has refrained from applying its own law it has generally done so where its interest was minimal and could only be advanced at great cost to the interests of a sister state. *See, e.g.*, Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

160. *See* text accompanying notes 65–92 *supra*.

161. In one case a California court did apply its own law in favor of a nonresident against a California resident. Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974). *Hurtado*, however, is distinguishable in that the court, in applying local law, was effectuating a state interest against the negligent operation of motor vehicles in the state. *Cornelison* is inapposite because the negligent operation occurred in Nevada.

court, it is nonetheless important to note that consequences meaningful to the parties did arise from the decision to assert jurisdiction. It is suggested that these consequences should not pass unnoticed but should be consciously considered by the court at the time the decision to exercise jurisdiction is made. When so evaluated, the court could easily have concluded that the assertion of jurisdiction would lead to consequences which made adjudication in California unfair from a due process perspective.

The impact of *Shaffer* is not limited to traditional *in personam* actions such as *Cornelison*. *Shaffer* poses even greater problems in the field of traditional *in rem* actions. These problems can be examined through the following hypothetical.[162]

Assume Creditor enters into a relationship with Debtor which is formalized in State *X*. The transaction carries an interest rate of 25% per annum which is a lawful rate of interest in State *X*. To secure the debt both as to principal and interest, Debtor creates a security interest in real property he owns in State *Y*. The security interest is created and executed in State *Y*, and the documents memorializing the security interest are properly filed in State *X*. Assume further that the Debtor is a resident of State *Y*, and that the interest rate is usurious under the law of State *Y*.

The Debtor defaults. There are two possible locations where suit can be commenced: in State *X* where the debt obligation and security agreement were incurred and formalized or State *Y* where the Debtor and the security are located.

The propriety of litigating the entire lawsuit in State *X* can scarcely be doubted. The debt transaction, the parties, and the circumstances giving rise to the debtor-creditor relationship all arose in State *X*. State *X* has a valid interest in applying its law to the controversy since the question of the enforceability of agreements entered into within the state are at issue.

Litigating the controversy in State *Y* is, however, an altogether different question. First, while the presence of the security (the land is in State *Y*) is a forum contact of sorts, it appears to be of itself insufficient to sustain full *in personam* jurisdiction over Creditor in State *Y*.[163] Yet, it has been held that the intentional creation of a *res* in the forum is sufficient to create a *limited* per-

162. The hypothetical is based upon *Combs v. Combs*, 249 Ky. 155, 60 S.W.2d 368 (1933), discussed *supra* at notes 51–53 and accompanying text.

163. At least this much must be conceded if *Shaffer* has any meaning whatsoever.

sonal jurisdiction.[164] Moreover, the fact that the *res* involves realty is some support for the assertion of a limited form of jurisdiction.[165] This latter proposition results from the traditional deference the Supreme Court has exhibited toward state control over real property within the forum.[166]

If we assume that State *Y* can assert some form of jurisdiction, probably limited to the property physically present in the state, what impact does *Shaffer* have in this context? As previously noted, under pre-*Shaffer* analysis the jurisdiction (and interests) of both States *X* and *Y* could be preserved by commencing an *in rem* action in State *Y*, where the land is situated.[167] After *Shaffer*, this approach is no longer feasible.

If State *Y* asserts a limited form of personal jurisdiction over Creditor to adjudicate interests in the land which forms the security for the debt, Creditor is in a difficult position. First, since the realty is no longer considered the "cause of action,"[168] Creditor will likely lose his debt cause of action if he does not assert it in the State *Y* proceeding.[169] If he does, however, assert the claim, he risks the possibility that State *Y* will treat the transaction as usurious[170] and either disallow enforcement of that part of the transaction or, worse yet, treat the counterclaim as a general appearance[171] and allow Debtor to institute a counterclaim for damages arising out of a transaction treated as usurious under the law of State *Y*. Under the full faith and credit clause, this State *Y* judgment would be enforceable in State *X*, where the transaction was legal.[172]

It is clearly the case that the consequences to Creditor of being

164. Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977) (jurisdiction acquired by attachment of nonresident's forum bank account).

165. *See* note 57 *supra*; *see also* Shaffer v. Heitner, 433 U.S. 186, 208 n.20 (1977).

166. *See, e.g.*, Fall v. Eastin, 215 U.S. 1 (1909) (court not having jurisdiction over the *res* cannot affect it by its decree). This so-called "land taboo" has not been favored. *See* Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954).

167. *See* notes 51–53 *supra* and accompanying text.

168. *See* note 23 *supra*.

169. *See* note 59 *supra*.

170. Most jurisdictions will recognize and enforce interest rates which are usurious under the law of the forum as long as they are within an "acceptable" range. *See* Burr v. Renewal Guaranty Corp., 105 Ariz. 549, 468 P.2d 576 (1970) applying RESTATEMENT (SECOND), CONFLICT OF LAWS § 203(2) (1971)). Where the differences between the forum's permissible rate of interest and the specified rate are extreme, the situation may be otherwise. *Cf.*, Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (refusing to recognize Massachusetts law on public policy grounds).

171. *See* Adam v. Saenger, 303 U.S. 59 (1938).

172. *See* Fauntleroy v. Lum, 210 U.S. 230 (1908); note 39 *supra*.

required to litigate a claim concerning interests in land situated in State *Y* are immense. Yet, these consequences follow inevitably from the integrated theory of jurisdiction espoused in *Shaffer*. It is difficult to believe that the Court intended such far-reaching consequences to result from its attempt to cure deficiencies in jurisdiction by attachment practices. Nonetheless, the problems exist and the only short-term solution is to ameliorate the effects of exercising jurisdiction by exercising constraint in the decision to assert jurisdiction. The above hypothetical presents an example of a situation where the consequences of asserting jurisdiction are so severe as to render suspect any decision to proceed on the basis of limited *in personam* jurisdiction. A proper approach would be for State *Y* either to decline to assert jurisdiction or to stay proceedings and require the Debtor to institute a lawsuit in State *X* where the entire matter could be adjudicated.

III. CONCLUSION

The question has been posed: what are the obligations of courts in rendering forum allocation decisions? As suggested above, courts should analyze forum allocation questions with respect to the entire fact situation and the total consequences to be realized by adopting possible alternatives rather than focusing solely upon the contacts among the forum state, the defendant, and the litigation. A proper regard for forum allocation would not distinguish the question of jurisdiction from those of choice of law or judgment preclusion. Rather, the totality of the allocation would be contemplated and the decision where to decide the case would be made according to this considered amalgam.

In essence, courts need to redefine their methodology in forum allocation decisions so that all relevant facts and policies are considered in determining where a case having multistate aspects will be adjudicated. It is hoped that such a process will foster a more rational means of allocating judicial decisionmaking responsibility and reconcile the competing constitutional requirements of due process and full faith and credit.